91-203

Supreme Court, U.S.
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No. _____

In The

Supreme Court of the United States

October Term, 1991

CARSON WAYNE NEWTON, AKA: WAYNE NEWTON,

Petitioner,

v.

NATIONAL BROADCASTING COMPANY, INC.; BRIAN ELLIOT ROSS; IRA SILVERMAN; AND PAUL GREENBERG,

Respondents.

Petition For Writ Of Certiorari To The United States Court of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Where there has been a jury verdict in favor of a public figure defamation plaintiff, but the reviewing court does not regard those findings that the jury must have made as sufficient proof of actual malice, to what extent, if at all, may the reviewing court disregard additional findings supporting actual malice that the jury reasonably could have made and instead rely upon its own findings.

2. Where there has been a jury verdict in favor of a public figure defamation plaintiff, how should the reviewing court's independent evaluation of the sufficiency of proof of actual malice be affected by a trial record containing impeachment of the defendants' testimony, including self-contradictions.

3. Where there has been a jury verdict in favor of a public figure defamation plaintiff, to what extent, if at all, may the reviewing court base its evaluation of the proof of actual malice upon its own statement-by-statement interpretation of the subject television broadcast (or printed publication), when its interpretation conflicts with the overall meaning derived by the average member of the intended audience.

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The opinion of the Court of Appeals for the Ninth Circuit, filed August 30, 1990 and amended (by order entered) on April 5, 1991, is reported at 930 F.2d 662 and reprinted in the Appendix which follows this petition (hereinafter "A-___"), at page A-1 (Order at A-61). The opinion of the district court, denying the motion of the defendants (respondents herein) for judgment N.O.V. or for a new trial, is reported at 677 F. Supp. 1066 (D. Nev. 1987). (A-77)

JURISDICTION TO CONSIDER PETITION

This Court has jurisdiction to review the Ninth Circuit's judgment by writ of certiorari under 28 U.S.C. § 1254(1) (1988).

The district court had subject matter jurisdiction under 28 U.S.C. § 1332 (1982), as amended. Final judgment upon jury verdict in favor of plaintiff (petitioner herein) Carson Wayne Newton ("Newton"), and against defendants National Broadcasting Company, Inc. ("NBC"), Brian Ross ("Ross"), Ira Silverman ("Silverman"), and Paul Greenberg ("Greenberg"), was entered on February 10, 1989. (A-72)*

Defendants' notice of appeal was timely filed on February 27, 1989. (A-69) Fed.R.App.P. 4(a)(1). The Ninth

*All parties to this case are listed in the caption to this petition, notwithstanding the reference to "et al." in the caption of the opinion of the Ninth Circuit. (A-1)

Circuit had jurisdiction under 28 U.S.C. § 1291 (1982), the district court having finally disposed of all claims of all parties.

Newton timely filed his petition for rehearing, within 15 days of the August 30, 1990 judgment, on September 13, 1990 (*see* A-66), Fed.R.App.P. 40(a), which was denied by order entered on April 5, 1991. (A-1, A-61) Justice O'Connor, by Order dated June 4, 1991 (App. No. 910), extended the time for filing this petition to August 3, 1991, thereby effectively extending the due date to Monday, August 5, 1991. (A-68) *See* Sup.Ct.R. 13.1, 13.2, 30.1, 28 U.S.C. § 2101(c) (1988).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part: "Congress shall make no law . . . abridging the freedom of speech, or of the press . . . "

The Seventh Amendment to the United States Constitution provides in relevant part: "In suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States, than according to the rules of common law."

STATEMENT OF THE CASE

The Broadcast And Related Events

This case concerns a pre-recorded 3 and 1/2 minute NBC television broadcast, which NBC promoted as follows: "Singer Wayne Newton and his alleged involvement with organized crime. Did the mob help him buy the Aladdin Hotel? Monday's Special Segment on NBC Nightly News." Newton's suit alleged (among other claims) that this October 6, 1980 broadcast conveyed three false and defamatory impressions about Newton: (1) that he used financial help from organized crime to purchase the Aladdin; (2) that, as a result, he had a hidden organized crime partner in the Aladdin deal; and (3) that he lied about this under oath to the Nevada Gaming Board. See Appendix hereto at A-88 for a broadcast transcript.[1]

Defendants Ross and Silverman were primarily responsible for the broadcast, having prepared it with no deadline pressure during many hours of intensive audio and video editing. They were an experienced television reporting team. (Reporter's Transcript, hereinafter "RT[Volume:page]," at 21:4276-79; 22:4643-49; 27:5549-51) They knew that Newton's financing for the Aladdin purchase came not from organized crime but

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[1] The actual videotape of this NBC broadcast was trial exhibit (hereinafter "Ex. ___") 285, and the promotional announcement was Ex. 283. NBC also aired other Ross and Silverman broadcasts, which Newton claimed reinforced the foregoing impressions, on November 6, 1980 (Ex. 298) and June 12, 1981 (Ex. 292). The videotapes, and other exhibits, should still be held by the Ninth Circuit Clerk.

from the Valley Bank of Nevada. (A-78, A-159-161) But their main reasons for contesting liability, which were subsequently adopted by the Ninth Circuit, were their denial of intent to convey the alleged impressions and their contention that the audio statements made during the television broadcast were literally true. These positions are exemplified in testimony by Ross:

> It seems your question was did I have doubts that there was a hidden interest. I had enough doubts not to say that on the air.
>
> Q. By your last answer you mean not to say it expressly on the air.
>
> A. Not to say it. I wrote a script and chose the words carefully.

(RT 25:5305-06)

At Ross and Silverman's urging, NBC rejected Newton's correction demand (A-93), similarly maintaining that "the report was accurate." (A-96) Evidence further revealed that, prior to the editing stage, the following significant events took place.

As of July, 1980, Ross and Silverman had heard of a federal investigation involving wiretapped telephone conversations between reputed organized crime figures Guido Penosi and Frank Piccolo in which Newton's name had been mentioned.[2] They had also learned that there

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[2] The Ninth Circuit's opinion says that "these taped telephone conversations [of the Penosi-Piccolo calls] came to the attention of Brian Ross and Silverman." (A-23) At trial, however, the defendants attempted to justify the broadcast's mischaracterization of the Newton-Penosi-Piccolo situation by

(Continued on following page)

had been nontapped telephone calls between Newton's home and Penosi's home.[3]

Ross and Silverman knew that Nevada Gaming Board agents were conducting a requisite pre-licensing investigation for the Aladdin purchase, and Ross had a meeting arranged with gaming agents Joe Dorsey and Lon Shepard on September 11, 1980. As reflected in the agents' written report (A-99) and Agent Shepard's testimony concerning the meeting, Ross and Silverman told them "that licensing Newton for the Aladdin would be embarrassing for the Board and the state. They [Ross and Silverman] also stated that they were working on an investigative report for a national news show regarding Newton, the Aladdin and o[rganized] c[rime] figures which would air nationwide in the next few weeks." Ross and Silverman also referred to telephone calls between Newton and Penosi during February and May of 1980. (A-99-101)

Agent Shepard informed Ross that the agents had fully investigated Newton, and that Penosi did not have any financial control over him. Shepard also told Ross "that Penosi was merely Wayne Newton's fan who might have helped Newton stop some threatening phone calls

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offering Ross's testimony that he and Silverman did not actually have the benefit of listening to the wiretaps, or of seeing a transcript of them, until the government produced them during this litigation. (A-146)

[3] Neither Newton's voice, nor that of his long-time friend, attorney Mark Moreno (who was a witness at trial), were on any wiretap. (A-124, A-153)

to his life and to his wife and child's lives," that "there did not seem to be any relationship [between Newton and Penosi] that they [Ross and Silverman] were looking at," and that "they were barking up a wrong tree regarding the Penosi/Newton connection." (A-127-134) The evidence at trial confirmed the truth of these statements to Ross.[4]

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[4] The evidence at trial showed the following. Penosi had been a fan of Newton since 1962 when Newton (at age 20) and his group performed at New York's Copacabana night club – a job arranged by entertainer Jackie Gleason. There were infrequent and inconsequential contacts between Penosi and Newton until early 1980. Newton at that time began receiving telephone calls threatening the lives of his three-year-old daughter and himself, which started after Newton had a heated dispute related to his investment in a local entertainment tabloid operated by Las Vegan Ron Delpit. Requests to the local police for help were to no avail. Having information that the threats were coming from someone in the Los Angeles area who called himself "D" or "Dapper," Newton called Penosi because he knew that Penosi resided in Beverly Hills and had previously been in prison. Newton asked Penosi to see if he could locate the person behind the threats and find out what he wanted. Penosi located Dapper (who turned out to be connected with a separate organized crime network) and, after consulting by telephone with Piccolo, who was related to Penosi by marriage, Penosi stopped the threats by paying Dapper $3,500.

Newton did not discuss the Aladdin during his telephone conversations with Penosi. (RT 6:917) Nor did he discuss the Aladdin in either of his two telephone conversations with the man he understood to be a relative of Penosi's named "Frank," who turned out to be Frank Piccolo. (RT 6:917; 7:1171-72; 8:1334-35; 30:6364)

Silverman admitted in deposition testimony read at trial that he did "not particularly" have any reason to doubt that there had been a full investigation of Newton's relationship with Penosi by the gaming agents. (A-161-165) Nor, he admitted, did he have "any reason supportive of the possibility that Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino was not financed totally through a loan to him personally from the Valley Bank of Nevada." (A-159-161)

Ross admitted in deposition testimony read at trial that he and Silverman had verified in their minds that the problem Newton had, which caused him to contact Penosi, actually concerned a dispute with someone over whether Newton owed approximately $20,000 in connection with an investment in a magazine or publication. (A-144, 155-156)

Ross and Silverman had been informed of this by attorney Mark Moreno, Newton's long-time friend, who testified that he specifically made it clear to the reporters that Newton's resulting contacts with Penosi had nothing to do with the Aladdin purchase. (A-47) (RT 14:2714-16)

Silverman also admitted, in deposition testimony read at trial, of having received information from source "B", prior to the October 6, 1980 broadcast, further corroborating what he and Ross were told by Shepard and Moreno. (A-165-168)[5]

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[5] Some additional corroborative details Silverman said had been related to him by source B were that the "trouble involv[ed] Mr. Newton's dealings with Mr. Delpit [who operated a Las Vegas entertainment tabloid], and Mr. Delpit's

(Continued on following page)

Ross and Silverman attended and videotaped Newton's September 25, 1980 Nevada Gaming Board public hearing, wherein a Valley Bank officer explained the bank's dual roles of fully financing Newton's acquisition of half-ownership of the Aladdin and of acquiring the other half-ownership interest itself as trustee for the Edward Torres Children's Trust. (A-78)[6]

Immediately after the Board voted to unanimously recommend licensing, Ross, according to the trial testimony of Board Chairman Richard Bunker, "accosted" the chairman, "raise[d] his voice" and "was rude, arrogant

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associates." According to Silverman, "[m]y best recollection was that there was a business deal involving Mr. Newton, Mr. Delpit and others that went sour, and that there was ugliness and demands, threats, that kind of thing." Silverman also testified as to what "source B was indicating": "Whether he [Newton] – *probably without any knowledge on his part*, Piccolo and Penosi were looking to come in behind their relationship with Wayne Newton, and try to make some sort of what they call a score. Some sort of criminal profit from the relationship." (RT 23:4790-91) (emphasis added) There was no discussion, however, about becoming involved with Newton's purchase of the Aladdin, although the Aladdin was referred to during the course of the conversations between Penosi and Piccolo. (A-23 n.23)

[6] Edward Torres was also personally before the Board for licensing as the prospective operator of the hotel-casino. Agent Shepard testified that when he informed Ross at the September 11, 1980 meeting to the effect that Torres was much more likely to be denied a license than Newton, Ross said to him that "that wasn't newsworthy enough." Ross said that they were "looking for more spectacular news." (RT 16:3041-42)

and accusatory" toward the chairman, and "seemed to be unhappy about something." (A-176-78)

Instead of staying in Nevada the next day for Newton's Gaming Commission hearing, Ross and Silverman flew to Los Angeles to meet, at their request, with Johnny Carson and his attorney Henry Bushkin at Carson's home. Ross and Silverman had learned months earlier that Newton had outbid NBC television superstar Johnny Carson, who had also wanted to purchase the Aladdin. The reporters had also been aware for months of an ongoing feud between Carson and Newton. (RT 24:4985-87; 4:601-06; 8:1453-55; 17:3300-06; Exs. 464, 749) Carson testified about what Ross and Silverman said at this meeting:

> Now, I guess they were telling us out of interest because we had been involved in trying to purchase the Aladdin Hotel, Mr. Nigro and I. The general conversation simply ran to the effect that *they were going to do a segment allegedly to show Wayne Newton was involved with some people in the purchase of the hotel.* I don't remember all the names of the people that they mentioned. And generally that's what, that's what it was about. The goings on behind the purchase of the Aladdin Hotel as concerned Mr. Newton.
>
> * * * *
>
> Q. Is there anything else that you can recall these gentlemen saying to you?
>
> A. The name Penosi was brought up. I did not know the gentlemen, . . .

(A-134-136) (emphasis added) Carson subsequently testified about the meeting: "All I can say again at the

expense of being redundant, it was a general conversation on something that NBC News was pursuing as a segment of their news involving the Aladdin Hotel, Wayne Newton and the specific name the only one specific name that I recall was Penosi . . . " (A-136-138)

Eleven days after this meeting with Carson, NBC aired the October 6, 1980 special segment which falsely conveyed the impression that Newton was involved with Penosi in the purchase of the Aladdin, while omitting that a bank financed the purchase and that Newton's involvement with Penosi related to something else.[7]

The Jury Verdict And Judgment For Newton

The jury trial in Las Vegas, Nevada was presided over by visiting Senior District Court Judge Myron D. Crocker, from Fresno, California. He instructed the jury that, as to the alleged impressions, plaintiff's burden would be to prove, by clear and convincing evidence, not only actual malice (knowledge of falsity or reckless disregard for the truth), but also an intent to convey the impressions. (A-126) The jury found, by special verdict (A-84), that all of the defendants had conveyed one or more false and defamatory impressions with actual malice, as alleged.[8]

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[7] (A-78-79, A-88-93) Even NBC's Vice President of News Coverage, Edward G. Planer, and NBC's Special Segment field producer, Mary L. Flynn, in their deposition testimony read at trial, interpreted the broadcast's meaning to be that organized crime helped finance Newton's Aladdin purchase. (A-179-182)

[8] The jury also found that Ross and Silverman had conveyed one or more false and defamatory specific statements with actual malice. (A-85-86)

In denying defendants' JNOV motion, Judge Crocker said: "The Court is satisfied from its independent review of all of the evidence in this case that plaintiff has met his burden of proof by clear and convincing evidence." He described the three alleged defamatory meanings in finding that they were all falsely conveyed by "clear and inescapable impression" with actual malice. He also said: "Although defendants testified they did not intend the broadcasts to convey a defamatory impression, the evidence is such that the jury was entitled to reject their testimony as incredible and find that defendants must have had serious subjective doubts about the truth of the broadcasts." (A-78-79)

Judge Crocker nevertheless concluded that Nevada law limited presumed damages and that Newton's reputation had not been seriously injured.[9] He therefore gave Newton the choice of a reduced compensatory award of $275,000, together with the untouched $5 million in punitive damages against NBC, or a new trial.[10] Newton accepted the remittitur and defendants appealed. (A-69, A-72)

The Independent Review And Reversal On Appeal

The Ninth Circuit Court of Appeals, in an amended opinion by Judge William A. Norris, issued before this

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[9] Judge Crocker relied upon evidence that, after the broadcasts, Newton received certain local honors as well as several national honors from President Reagan. (A-80-81)

[10] (A-82-83) The jury had awarded compensatory damages exceeding $14 million, along with the $5 million in punitive damages against NBC – the only defendant from whom they were sought. (A-87)

Court's decision in *Masson v. New Yorker Magazine, Inc.*, 59 U.S.L.W. 4726 (U.S. June 20, 1991), denounced the jury as biased in favor of a "hometown hero" based upon evidence such as Newton's having been named Nevada's "Republican Man of the Year" in 1981.[11] The Ninth Circuit then applied a version of independent judicial review of the record (to be discussed) whereby it adopted defendants' position on nearly every contested fact or inference, so as to ultimately determine that there was "almost no evidence of actual malice."[12] On that basis, the Ninth Circuit reversed the judgment and dismissed the complaint. (A-8, A-11, A-60)

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[11] (A-2-3, A-16-17 & n.15) The Ninth Circuit analogized NBC's having to defend itself at a federal jury trial in Las Vegas, Nevada in 1986 (presided over by a visiting senior district court judge) to the New York Times having to defend itself in an Alabama state court during the 1960s. Yet, at trial, counsel for defendants made no contention that any juror was biased and actually stated that "the entire panel is acceptable." (A-123)

[12] (A-60) This is the determination addressed in this petition. The Ninth Circuit did, however, devote much of its opinion to personally discrediting Newton (as well as Moreno), thereby adopting defendants' approach to the litigation. *See generally* A-19-39. In so doing, the Ninth Circuit interpreted the record in the light most unfavorable to Newton. For example, the opinion relates negative retrospective testimony about Newton by gaming agent Fred Balmer, who participated in Newton's prelicensing investigation (A-23-26), but omits Balmer's own testimony that he was personally influenced by the very NBC broadcasts at issue, and also omits that Balmer's personal judgment was criticized at trial by the Gaming Board chairman and Balmer's fellow agent. (RT 11:1933-38, 1946-51, 1960-67; 14:2619-20; 16:3022)

REASONS FOR GRANTING THIS PETITION

I.

THIS CASE TURNS UPON THE QUESTION, LEFT UNRESOLVED BY *HARTE-HANKS*, AS TO HOW THE CONSTITUTION GOVERNS THE "INDEPENDENT REVIEW" OF AN ACTUAL MALICE FINDING IN A PUBLIC FIGURE DEFAMATION CASE.

Harte-Hanks Left Open the Degree of Deference to Be Given on Independent Review to Jury Findings Supporting Actual Malice.

In *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657 (1989), this Court granted certiorari to consider whether the Sixth Circuit's affirmance of a judicial candidate's defamation judgment against a newspaper "was consistent with our holding in *Bose*." 491 U.S. at 659, 662. The requirement of *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485 (1984), that judges "exercise independent judgment and determine whether the record establishes actual malice with convincing clarity," 491 U.S. at 659, was unclear as to the deference applicable to a jury finding supporting actual malice. That uncertainty presented the "most significant question upon which certiorari was granted," a question "of overwhelming importance in libel actions." 491 U.S. at 697 (Scalia, J., concurring in judgment). Specifically, *Harte-Hanks* "squarely raised . . . the conflict" as to whether

> the trial judge and reviewing courts must [under the District of Columbia Circuit's approach] make their own "independent" assessment of the facts allegedly establishing malice; or rather . . . [under the Sixth Circuit's approach] they must merely make their own "independent" assessment that, *assuming all of the facts that could reasonably be found in favor of*

> *the plaintiff were found in favor of the plaintiff*, clear and convincing proof of malice was established.

491 U.S. at 697 (Scalia, J., concurring in judgment).

Ultimately in *Harte-Hanks*, this Court upheld the Sixth Circuit's affirmance of the plaintiff's judgment because what the jury "*must* have" found from the evidence was deemed sufficient to prove actual malice. 491 U.S. at 690-91. This Court, therefore, did not have to concern itself with what deference should be given to other findings supporting actual malice that the Sixth Circuit believed "the jury [reasonably] 'could have' " made. 491 U.S. at 689-90. Consequently, as indicated in Justice Scalia's concurring opinion, 491 U.S. at 699-700, *Harte-Hanks* left open a significant part of the conflict concerning independent review of a jury's actual malice determination: the extent to which a reviewing court may disregard findings supportive of actual malice that the jury reasonably *could have* made where, as here, the reviewing court deems what the jury *must have* found to be insufficient. *Hart-Hanks* also thereby left open the related question of whether and to what extent the reviewing court may make its own findings, at variance with the jury's determination of actual malice, in carrying out its apparent obligations to examine "the entire record" and to "examine for itself the statements in issue and the circumstances under which they were made." 491 U.S. at 688-89.

This Case Squarely Presents the Question Left Open by *Harte-Hanks* And Does So in a More Certworthy Context.

In retrospect, the Sixth Circuit's opinion in *Harte-Hanks* merely presented this Court with the question

whether there had been the most prudent application of independent review in affirming the plaintiff's judgment; the judgment itself was in no apparent jeopardy. Here, by contrast, the Ninth Circuit reversed Newton's judgment and dismissed his complaint because of its application of independent review.

The Ninth Circuit interpreted *Harte-Hanks* as having "rejected the approach of the [Sixth Circuit] Court of Appeals." (A-49 n.41)[13] In formulating its own approach to independent review, the Ninth Circuit described it as a "daunting task" to strike the proper balance between First and Seventh Amendment values since, according to the Ninth Circuit, even the Supreme Court has "struggled" in that effort. (A-3, A-18) The Ninth Circuit characterized its approach in terms of applying different levels of qualified deference to the jury's findings. (A-14-15) Its opinion states: "[t]he presumption of correctness carries its maximum force when we review findings of fact that turn on credibility determinations . . . On the other hand, the presumption applies with less force when a fact-finder's findings rely on its weighing of evidence and drawing of inferences." According to the Ninth Circuit, "even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless ' "examine for ourselves" ' the factual record in

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[13] Apparently as a result of its interpretation of *Harte-Hanks*, the Ninth Circuit did not consider itself bound by its own prior standard of review for public figure defamation cases, which was similar to the Sixth Circuit's approach. *See, e.g., Maheu v. Hughes Tool Co.*, 569 F.2d 459, 464 (9th Cir. 1977), *and authorities cited therein.*

full." (A-14-16) Credibility determinations must also be evaluated so that "fundamental First Amendment values" do not give way to the "prejudices of local juries against alien speakers." (A-16) Such an approach would appear to be close to that of the D.C. Circuit and in conflict with the view of at least four Justices of this Court. *See Harte-Hanks, supra*, 491 U.S. at 694, 696, 700 (Chief Justice Rehnquist and Justices White and Kennedy, concurring, expressed the view that the Court's opinion is consistent with the view of Justice Scalia who, concurring in the judgment, said that he "would have adopted the Sixth Circuit's analysis in its entirety").

By applying independent review, the Ninth Circuit substituted its own findings for those that the jury reasonably could have made, including the acceptance of defendants' self-serving testimony as to their supposed actions, state of mind, and receipt of information from disclosed and undisclosed sources – testimony often characterized in its opinion as "uncontroverted" or "undisputed" evidence even though the jury and district court presumably disbelieved much, if not all, of it. (A-19-39, A-45-52)

For example, the Ninth Circuit accepted Ross and Silverman's explanation at trial that their meeting at Johnny Carson's house was merely part of their investigation (A-36), even though Carson testified that he could not remember being asked any questions (A-137), even though the reporters had already drafted the broadcast's script before going to Carson's home (A-139), and even though the reporters also made telephone calls to Carson's attorney Bushkin: (1) upon scheduling the meeting with Shepard and Dorsey ("re: Aladdin breaking story");

(2) on the day before the broadcast; and (3) on the day after the broadcast. (RT 16:3115-19, 3148-50; Exs. 556-57)

The Ninth Circuit did not regard Ross and Silverman's prebroadcast description of their contemplated broadcast to Carson and Bushkin as probative of an intent to convey the impressions found by the district court.[14] *Compare Harte-Hanks, supra,* 491 U.S. at 684 (premature commitment to story treated as evidence of actual malice). Nor did it regard the reporters' meeting with Carson and other contacts with his attorney, combined with the reporters' threat of the broadcast to the gaming agents and Ross's personal reaction to the outcome of Newton's licensing hearing, to be probative of a motive to falsely defame Newton. *Compare Harte-Hanks, supra,* 491 U.S. at 668 ("it cannot be said that evidence concerning motive or care never bears any relation to the actual malice inquiry").

The Ninth Circuit also accepted Ross and Silverman's self-serving trial explanation that the reason the broadcast did not even mention that Newton's calls to Penosi concerned the death threats to his family (rather than financing for the Aladdin purchase) was that the reporters supposedly disbelieved Moreno after he explained

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[14] In its opinion (A-36-37 & n.34), the Ninth Circuit did not address most of the previously quoted portions of testimony by Carson, which were specifically cited (most of it quoted) in Newton's Brief of Plaintiff/Appellee at page 30 (citing and quoting from RT 16:3172, 3174-75 (A-134-136 herein)), or in his Petition for Rehearing at page 13 (which additionally cites and quotes from RT 16:3177-78 (A-137-138 herein)).

that to them.[15] It was pointed out in Newton's petition for rehearing, however, that (as previously discussed, *supra* at pp. 5-7) Ross and Silverman admitted having knowledge of why Newton called Penosi, and that even the district court's published opinion mentioned that Ross and Silverman received corroboration of what Moreno told them from Board Agent Shepard and source "B". (A-78-79) This caused the Ninth Circuit to withdraw its original opinion (*see* 913 F.2d 652) and issue an amended one. (A-61-64) In a new footnote discussing the matter, the Ninth Circuit essentially ignored defendants' admissions and relied heavily on other testimony by defendants (given in response to questioning by their own counsel at trial) to still find no evidence of actual malice. (A-47 n.40, A-63)

After finding that Ross and Silverman "were not reckless in disregarding Moreno's information about threats" (A-50), the Ninth Circuit turned around and acknowledged the reporters' awareness of the threats so as to reject other evidence of actual malice. According to the Ninth Circuit, the reason it "was reasonable" to convey in the broadcast that Newton called Penosi because of a (serious) financial problem, "just before Newton announced he would buy the Aladdin," was that

> it is undisputed that a disagreement over an amount not less than $20,000 caused a fight

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[15] (A-47, A-50-51) The Ninth Circuit interpreted *Harte-Hanks* as permitting it to "apply the heightened First Amendment standard of review to the question of credibility in the eyes of the NBC journalists. Accordingly, we will not pay special deference to how the jury *may* have regarded Moreno's credibility as a trial witness." (A-49-50 & n.41)

> between Newton and at least one low-level member of an organized crime family. It was this disagreement that precipitated the threats to Newton and his daughter. NBC points out that $20,000 is a significant sum and that a debt to a mobster which leads to death threats presents a serious problem. . . .

(A-53-54)[16]

In making still other factual findings, the Ninth Circuit apparently accepted Ross's self-serving testimony that, because Newton himself said that he last talked to Penosi "maybe sometime last year," Ross thought it was "safe" to say in the broadcast: "last year just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem." (RT 25: 5318) Yet, Ross admitted "we knew the phone calls were in February [of 1980]," which was not "last year." (A-141-42) And cross-examination revealed that Ross had no basis for the words "just before," which could only have been used to further the false and defamatory impression that Newton called Penosi for help in buying the Aladdin. (A-150-53)

The Ninth Circuit also refused to regard as probative of actual malice either Ross's and Silverman's conduct toward Newton following Newton's Gaming Board hearing, or the distorted way that Ross and Silverman

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[16] The Ninth Circuit deemed the "disagreement over an amount not less than $20,000" as justification for this portion of the broadcast even though the Aladdin's purchase price was stated in the broadcast to be "85 million dollars" and Newton's salary to be "a quarter of a million dollars a week." (A-89)

depicted the encounter in the broadcast. (A-57-58) Outtakes (videotape edited out of the broadcast) confirmed Newton's testimony that Ross behaved toward him in a "frantic" manner between the hearing room and the parking lot. (RT 5:700-01; Exs. 277, 746)[17] During this encounter, Ross pointed his finger at Newton's chest, had his teeth clenched, cut off Newton's answers, erroneously quibbled with Newton over a minor matter, and failed to even ask Newton why he had contacted Penosi. (A-119-122)[18] Ross also refused Newton's request to conduct an interview at another time and place. (A-121) *Compare Harte-Hanks, supra,* 491 U.S. at 682 (evidence of actual malice where newspaper "chose not to interview the one witness who was most likely to confirm Thompson's account of events."). By these actions, Ross eventually provoked anger from Newton which Ross and Silverman portrayed out of context in the broadcast so that it appeared as if Newton had reacted angrily to a simple opening question about Penosi. (A-91)

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[17] A transcript of the audio portion of unedited videotape footage covering testimony by Newton at the Board hearing through the broadcast's scene in the parking lot, was in evidence at trial (Ex. 746) and is included in the appendix hereto. (A-102)

[18] The Ninth Circuit deemed it significant that Newton was asked this question (among others) by a Connecticut grand jury following the October 6, 1980 broadcast, when Newton was among those called to testify. (A-56 n.45) The transcript of that proceeding was not produced to the parties until the trial of this matter in October, 1986. (A-56 n.45) The grand jury indicted Penosi for allegedly conspiring with Piccolo to extort money from Newton, Lola Falona and Moreno, but Penosi was tried before a jury and acquitted. (Ex. 634)

Also rejected by the Ninth Circuit as probative of actual malice were outtakes showing that by deleting the second half of Newton's answer to a question asked of him at the Board hearing, defendants misleadingly made it appear in the broadcast as if Newton, while testifying under oath, had attempted to deceive the Board as to whether he'd had a relationship of any kind with Penosi.[19] This was followed in the broadcast by Ross's statement: "Federal authorities say Newton is not telling the whole story . . . " (A-90-91) *Compare Masson v. New Yorker Magazine, Inc.*, 59 U.S.L.W. 4726, 4733 (U.S. June 20, 1991) (evidence of actual malice if journalist altered meaning of quotations during lengthy editing process not involving hot news).

The Ninth Circuit, although acknowledging "an important conflict in the oral testimony," also selected certain trial testimony by Ross as to what was supposedly said to him by an anonymous source so as to justify Ross's statement in the broadcast that "police in New York say that this mob boss, Frank Piccolo, told associates he had taken care of Newton's problem, and had become a hidden partner in the Aladdin Hotel deal." Yet, this was but one of several inconsistent versions by Ross of what Piccolo was supposedly overheard to say (RT 24:4975-76; 25:5253-54; 26:5394-98; 27:5527-31), and Ross admitted that his undisclosed source may not have been "police" at

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[19] (Exs. 277, 285) (A-57-58, A-106) Ross and Silverman expressed "glee and pleasure" about having such videotape footage in a conversation they had with NBC Assistant General Attorney J. Marshall Wellborn. (A-156-58)

all. (RT 27:5537-42) New York City police officials testified that their police records showed no such information or statement. (A-27-29)

The Ninth Circuit misleadingly referred to the same statement in the broadcast in declaring that Ross and Silverman's admitted knowledge that Newton's purchase was entirely financed by the Valley Bank "has little probative value." (A-54-55) The Ninth Circuit seized upon trial testimony by plaintiff's organized crime expert, Professor G. Robert Blakey, that "[i]t's widely believed that organized crime wants to own the casino and that's normally not true," and that a hidden interest would normally be in a "skim" (RT 13:2417-19), to find that Ross and Silverman's knowledge that the Valley Bank's financed Newton's purchase "did not answer the question on whether any hidden interest existed." (A-55) Yet, the broadcast actually focused upon the Aladdin purchase, conveying the impression that the purchase was financed by organized crime and that a hidden interest was thereby formed. Nothing was mentioned in the broadcast about a skim. The opinion also makes no reference to any claim by Ross or Silverman that they had such concepts or information in mind at the time (as self-serving as their testimony otherwise was). (A-54-55) Moreover, the Ninth Circuit's reasoning would appear to be inconsistent with its earlier stated rationale for finding that Ross and Silverman were justified in not mentioning the threats to Newton and his family in the broadcast because that was merely a "*possible* explanation." (A-46-47 & n.40)[20]

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[20] The Ninth Circuit also drew other exculpatory inferences as to the state of mind of Ross and Silverman based upon

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Finally, the Ninth Circuit utilized its own determinations as to the meaning, including truth or falsity, of portions of the broadcast to reject otherwise reasonable inferences supporting actual malice, notwithstanding the jury's express finding (A-6 & n.3, A-85-86) that one or more specific statements were false and defamatory. *See, e.g.*, A-52 ("[t]he statement . . . was true, and, as such, is incapable of supporting a finding of actual malice."); A-54 ("The removal of the word . . . has little, if any, probative value . . . To the contrary . . . the statement appears to be accurate."); A-56 ("The sentence does not mislead viewers . . . "); A-57-58 ("The challenged material was a true depiction of Mr. Newton's conduct . . . ").[21]

Masson Strongly Suggests that the Ninth Circuit's Independent Review Here Prejudicially Overstepped the Judicial Role.

In *Masson v. New Yorker Magazine, Inc.*, 59 U.S.L.W. 4726, 4733-34 (U.S. June 20, 1991), this Court reversed

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information that the reporters did not even claim to have had or relied upon. *See, e.g.*, A-52-53 & n.44; A-103; RT 14:2617-18; 28:5790-91; 30:6262-63 (supposed exculpatory inference based upon trial testimony of Board member Glen Mauldin concerning financial matters that were discussed in a nonpublic ("rump") session or other closed session at which Ross and Silverman were not present); A-22-23 & n.23, A-146 (reference to select statements in wiretapped telephone conversations between Piccolo and Penosi which Ross and Silverman did not claim to hear until well after the broadcasts).

[21] In making such findings, the Ninth Circuit took no express position on an acknowledged conflict between appellate courts as to the standard of review for falsity. (A-10-11 n.7)

summary judgment for the defendants by drawing "all justifiable inferences in favor of the nonmoving party, including questions of credibility and of the weight to be accorded particular evidence." *A fortiori*, if the plaintiff in *Masson* were to later win at trial based upon the same evidence, it would make no apparent sense for the court of appeals to then apply a standard of review different than this Court's, which might result in a reversal. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986) (summary judgment standard "mirrors the standard for a directed verdict"). It therefore stands to reason that the Ninth Circuit's opinion in this case cannot be reconciled with *Masson*. Moreover, because there is such a broad range of circumstantial evidence supporting actual malice here (not all of which can be discussed in this petition), this case is more compelling than *Masson*, where the reversal of summary judgment was substantially based upon reasonable inferences from the plaintiff's own (self-serving) testimony. (A-22-23)

Consistent with *Masson*, a reviewing court should not be permitted to make wholesale substitutions of its own findings for those that the jury reasonably could have made. Otherwise, trial by jury becomes little more than a necessary hurdle en route to the "real" trial by judges.

II.

THIS CASE DEMONSTRATES THE NEED TO CLARIFY INDEPENDENT REVIEW OF TESTIMONY BY DEFENDANTS WHO DENY ACTUAL MALICE.

This Court has stated: "When the testimony of the witness is not believed, the trier of fact may simply

disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion." *Bose Corp., supra,* 466 U.S. at 512. (A-15-16) This case reveals, however, that two pertinent matters may still need clarification after *Harte-Hanks.*

First, the Ninth Circuit gave no indication that it regarded the fact that defendants gave discredited testimony on material matters as *some* evidence of actual malice, even if not sufficient by itself. This Court has now indicated in *Masson,* however, that some evidence of actual malice did lie in "Malcolm's explanations . . . not being consistent in all respects." 59 U.S.L.W. at 4733.

Second, the Ninth Circuit considered itself free to accept select testimony of witnesses, including self-serving testimony by the defendants, especially if it did not regard the specific testimony as having been discredited. *Masson,* however, suggests that a reviewing court should not be permitted to rely upon such testimony to overturn a plaintiff's judgment upon jury verdict, even in a public figure defamation case. That would especially be true where, as here, the record indicates some self-contradiction in testimony given by the witness.[22] *See Masson,*

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[22] In addition to the impeachment of defendants' testimony thusfar discussed, there were many other such instances at trial. For example, Silverman attempted at trial to explain away his 1982 deposition admission of having no particular reason to doubt the thoroughness of the gaming agents' investigation of Newton: "I think, Judge, that my answer today would be different, having had a chance - this deposition was taken at a time when Brian Ross and I were working at our jobs and could not focus as carefully as we can now here in this

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supra, 59 U.S.L.W. at 4733 (Court declined to give weight to Malcolm's (self-serving) typewritten notes). It stands to reason that what *Masson* suggests should apply here and in other public figure defamation cases, or, once again, trial by jury is rendered virtually meaningless.

III.

INDEPENDENT REVIEW SHOULD NOT BE BASED UPON AN INTERPRETATION OF THE BROADCAST (OR PRINTED PUBLICATION) THAT CONFLICTS WITH THE MEANING DERIVED BY THE AVERAGE MEMBER OF THE INTENDED AUDIENCE.

Opinions of this Court have generally acknowledged that there can be liability for false and defamatory implications, or impressions, in a public figure libel case.[23]

(Continued from previous page)

trial." (A-161-62) But Silverman was then confronted with his prior admissions that, shortly before his own deposition, he read all five volumes of deposition testimony Ross had given, and, after his deposition, he made no corrections to the transcript when he had the opportunity to make them. (A-168-169; A-162-63) As further examples, defendants Ross and Greenberg each gave testimony at trial of their supposed recollection of the reasons for changes in the broadcast's script, but it was shown at trial that they had each testified in depositions five years earlier that they could recall nothing about the changes. (A-147-149; A-171-174)

[23] *See Masson, supra*, 59 U.S.L.W. at 4732 ("many of the quotations at issue might reasonably be construed to state or imply factual assertions that are both false and defamatory"); *Milkovich v. Lorain Journal Co.*, 110 S.Ct. 2695, 2706-07 (1990) (liability "[w]here a statement of 'opinion' on a matter of public concern reasonably implies false and defamatory facts

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Here, the Ninth Circuit criticized the district court for finding evidence of actual malice where "clear and inescapable" defamatory impressions resulted from careful editing by experienced reporters who knew that such an impression (if conveyed) would be false. (A-41-45) According to the Ninth Circuit,

> [t]he district court erred because it substituted its own view as to the supposed impression left by the broadcast for that of the journalists who prepared the broadcast. This substitution gave the trier of fact an expanded role which *New York Times*, *Bose*, and *Harte-Hanks* do not permit.

Indeed, the Ninth Circuit purportedly negated such evidence of actual malice in this case by making independent determinations throughout its opinion as to the literal meaning and supposed truth of individual statements made during the broadcast. And the Ninth Circuit further stated: "We do not review a publication for the purpose of replicating the review it would receive from the average reader or listener." (A-44-45, A-59)[24]

It stands to reason, however, that experienced professionals, such as Ross and Silverman, are in a position to

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regarding public figures or officials"); *Harte-Hanks*, *supra*, 491 U.S. at 662 n.3, 693 (affirmed Sixth Circuit, which "had observed that 'the article was defamatory in its implication' ").

[24] Elsewhere in its opinion, however, the Ninth Circuit inconsistently drew its own conclusion about the overall broadcast in rejecting an inference of actual malice. (A-46: "the inclusion of the additional fact . . . would not have changed the substance of the broadcast.")

know when their work will convey a particular impression to the average member of the intended audience, especially when, as here, they are not reporting hot news under urgent deadlines and a clear impression is conveyed. At least under these circumstances, the jury should be permitted to regard it as some evidence that the impression was intended. Otherwise, one who is clever in defaming by implication and is willing to deny intent to convey, may be effectively immune. *Compare Masson, supra,* 59 U.S.L.W. at 4732-33. Obviously, for there to be liability in a public figure defamation case, the defendant must still have acted with knowledge or reckless disregard of the falsity of such an impression. Here, however, that was not seriously disputed since Ross and Silverman had knowledge of Newton's true source of financing for the Aladdin purchase, as well as his true reason for contacting Penosi.

CONCLUSION AND PRAYER

For the foregoing reasons, petitioner Carson Wayne Newton respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit, decided on August 30, 1990 and amended on April 5, 1991 on denial of rehearing, which reversed his judgment upon jury verdict and dismissed his complaint. This Court should thereafter vacate or reverse the judgment of the Court of Appeals, and reinstate the judgment of the district court or remand for further proceedings. Alternatively, this case should be remanded for further consideration in light of this Court's opinion in *Masson* and the points

asserted herein, or the decision on certiorari should be deferred until this Court deems it to be the appropriate time to consider these important issues.

Respectfully submitted,

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Carson Wayne NEWTON, aka: Wayne Newton, Plaintiff-Appellee,

v.

NATIONAL BROADCASTING COMPANY, INC.; Brian Elliot Ross; Ira Silverman; Paul Greenberg, et al., Defendants-Appellants.

Carson Wayne NEWTON, aka: Wayne Newton, Plaintiff-Cross-Appellant,

v.

NATIONAL BROADCASTING COMPANY, INC.; Brian Elliot Ross; Ira Silverman; Paul Greenberg, et al., Defendants-Cross-Appellees.

Nos. 89-55220, 89-55285.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted April 13, 1990 – Pasadena, California.

Decided Aug. 30, 1990.

Opinion, as Amended on Denial of Rehearing and Rehearing En Banc April 5, 1991.

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Appeal from the United States District Court for the Central District of California, Myron D. Crocker, Senior District Judge, Presiding.

OPINION

Before GOODWIN, Chief Judge, NELSON and NORRIS, Circuit Judges.

WILLIAM A. NORRIS, Circuit Judge:

In the Report on the Virginia Resolutions of 1798, James Madison wrote:

> In every state, probably, in the Union, the press has exerted a freedom in canvassing the merits and measures of public men, of every description, which has not been confined to the strict limits of the common law. On this footing, the freedom of the press has stood; on this foundation it yet stands. . . .

4 Elliot's Debates on the Federal Constitution 570 (1876). In *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964), the Supreme Court secured for the press the ability to write and publish freely without risking vindictive reprisals from local juries. The Court in *New York Times* adopted as a constitutional rule the requirement that appellate courts independently review jury findings of "actual malice" in public figure defamation cases. There, the rule of independent review was applied to set aside a verdict of an all-white Alabama jury against a New York newspaper and several black civil rights leaders in favor of the local Commissioner of Public Affairs. Here, we consider the largest punitive damages verdict in American libel history returned against a

different New York news organization by a Las Vegas jury in favor of a hometown hero. We must decide the extent to which the rule of independent review in *New York Times* and its progeny requires us to depart from the traditional rule of deference to the fact-finding function of the jury. Just as the Supreme Court struggled in *Bose Corp. v. Consumers Union of United States*, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984) and *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 105 L.Ed.2d 562 (1989) to strike the proper balance between our constitutional (Seventh Amendment) deference to the factfinder and our constitutional duty to safeguard First Amendment values, we now face the daunting task of reconciling our duty to respect the jury's fact-finding role with our duty to protect the values enshrined in the First Amendment.

On October 6, 1980, National Broadcasting Company, Inc. (NBC) broadcast on television a three and one-half minute story called "Wayne Newton and the Law" on the NBC Nightly News. Relevant excerpts from the script of that story read as follows:

> . . . [Guido] Penosi is a New York hoodlum from the Gambino Mafia family, a man with a long criminal record, now believed to be the Gambino family's man on the West Coast, in the narcotics business, and also in show business. Penosi is also a key figure in a federal grand jury investigation . . . that involves one of the big casinos here [Las Vegas], the Aladdin; and one of Las Vegas's top performers, singer Wayne Newton. Newton is said to make a quarter of a million dollars a week for his nightclub act, and late last week, Newton and a partner were given state approval to buy the Aladdin Hotel in Las Vegas for 85 million dollars. A federal grand

jury is now investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin. Despite his big income, authorities say Newton has had financial problems. Investigators say that last year, just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem. Investigators say whatever the problem was, it was important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank Piccolo, told associates that he had taken care of Newton's problem and had become a hidden partner in the Aladdin hotel deal. At a hearing of the State Gaming Board, Wayne Newton said he had no hidden partners, and Newton said under oath that he knew Guido Penosi . . . but that Penosi was just a long-time family friend.

* * *

Federal authorities say that Newton is not telling the whole story, and that Newton is expected to be one of the first witnesses in the grand jury investigation. Newton became angry when we tried to talk to him about his relationship with Guido Penosi.

* * *

Guido Penosi told us he doesn't know anyone named Wayne Newton. Federal authorities say they know of at least 11 phone calls Penosi made to Newton's house in one two-month period, and authorities say those phone calls and Penosi's relationship with Newton and other entertainment figures are now part of a broad year-long FBI investigation of the investment of East Coast mob money from narcotics and racketeering into the entertainment business in Las Vegas and Hollywood.[1]

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[1] Excerpts of Record (ER) at 43-47.

On April 10, 1981 appellant Carson Wayne Newton filed a defamation action against NBC and three of its journalists: Brian Ross, the reporter, Ira Silverman, the field producer, and Paul Greenberg, the executive producer. Newton claimed that the October 6 broadcast, and two subsequent broadcasts concerning the grand jury investigation and indictment, either falsely stated or conveyed the false impression that "the Mafia and mob sources" helped Newton buy the Aladdin in exchange for a hidden share of the hotel/casino and that Newton, while under oath, deceived Nevada state gaming authorities about his relationship with the Mafia.[2]

Discovery proceedings commenced in Las Vegas, the venue in which Newton had filed his complaint. When

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[2] The trial judge in the jury instructions described the following impressions possibly conveyed by NBC's broadcasts:

> 1. Financing of Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino, Las Vegas, Nevada, was obtained by and through [m]afia and mob sources, and Wayne Newton holds a hidden ownership in said Aladdin Hotel and Casino for the benefit of said Mafia and mob sources.
>
> 2. Wayne Newton has not truthfully related to Nevada gaming authorities the facts of his relationship with Guido Penosi and Wayne Newton is associated with Guido Penosi who is involved in both narcotics business [sic] and show business on the west coast;
>
> 3. Visually depicts Wayne Newton testifying, under oath, before the Nevada gaming authorities and in connection with said testimony, states that Federal authorities say Newton is not telling the whole story.

Appellee's Supplemental Excerpt of Record (SER) at 231-32.

discovery was completed, NBC moved for summary judgment and a change of venue from Las Vegas. The district court denied summary judgment on the ground that the jury could find that the NBC broadcasts left a false and defamatory impression about Newton, notwithstanding the fact that NBC had "made a substantial and persuasive showing that each of the statements made are either true or protected under the common law privilege of fair reporting." ER at 160. The district court also denied the motion for a change of venue.

Following a 37-day trial, the jury returned a special verdict, finding all four defendants liable for defaming Newton. The jury explicitly found that at least one statement and one impression about Newton conveyed by one or more of the three broadcasts was defamatory, of a factual nature, and was false.[3] The jury also found that two of the three NBC journalists had made a false and defamatory statement with knowledge of falsity or with serious subjective doubts about the statement's truth or accuracy and that all three individual defendants intended to convey a false or defamatory impression about Newton with knowledge of falsity or serious subjective doubt about the truth of the impression. The district court, in considering NBC's motion for judgment

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[3] Special Verdict Question 4A asked the jury "[H]as Mr. Newton proved by clear and convincing evidence that any false and defamatory statement of a factual nature about him was stated in one or more of the three broadcasts complained of with knowledge of falsity or with serious subjective doubt about its truth on the part of any of the defendants?" SER at 251.

notwithstanding the verdict, discussed only what it considered to be the false impression created by the broadcasts. *Newton v. National Broadcasting Co., Inc.*, 677 F.Supp. 1066, 1067 (D.Nev.1987) ("The clear and inescapable impression made by the broadcasts was that [Newton] did not have enough money to buy the Aladdin Hotel so he called a friend, Guido Penosi, who had ties to organized crime; and that Mr. Penosi helped him raise the money and thus obtained a hidden interest in the Aladdin Hotel").

The jury awarded Newton more than $19 million in compensatory and punitive damages, to which prejudgment interest of approximately $3.5 million was added. In response to NBC's motion for judgment notwithstanding the verdict and in the alternative for a new trial, the district court upheld the jury's verdict of liability and its awards of damages for pain and suffering and punitive damages. It set aside the verdict on the jury's award of $9,046,750 for Newton's claims of lost past and future income, ruling that Newton "failed to establish by a preponderance of the evidence that the broadcasts in question had any causal connection to any alleged loss of past or future income. . . . " *Id.* at 1069.

The district court also set aside the jury's award of $5 million for damage to Newton's reputation, concluding that the award "shocks the conscience of the court because the broadcasts did not tarnish [Newton's] outstanding reputation." *Id.* at 1068. The court directed Newton to file a remittitur of all sums except $225,000 for physical and mental injury, $50,000 as presumed damages to reputation, and $5 million in punitive damages or there would be a new trial on all issues. In addition to ordering

a new trial if the remittitur were not filed, the district court ruled that the interests of justice required that the new trial be held in the Central District of California. *Id.* at 1069. Put to the choice of a new trial outside Las Vegas or filing the remittitur, Newton filed the remittitur.[4] Final judgment for $5,275,000 was entered on February 10, 1989. This timely appeal followed.

The issue of actual malice disposes of this appeal.[5] Newton now concedes that he is a "public figure" as that

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[4] This partial grant of judgment notwithstanding the verdict is the subject of a cross-appeal by Newton. Newton asks us to reinstate the verdict of the jury on his claims of lost past and future income notwithstanding the fact that he accepted a remittitur and judgment was entered on the reduced award. NBC filed a motion to dismiss Newton's cross-appeal in which it contends that Newton may not attack the district court's reduction of damages because he has filed a remittitur. NBC's argument is persuasive. It is well settled that "a plaintiff in federal court . . . may not appeal from a remittitur order he has accepted." *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650, 97 S.Ct. 835, 837, 51 L.Ed.2d 112 (1977) (per curiam). This rule applies to cross-appeals. *999 v. C.I.T. Corp.*, 776 F.2d 866, 873 (9th Cir.1985) ("the rule in this circuit long has been that the plaintiff cannot contest the validity of a remittitur to which he has consented, even on cross-appeal"). Although our circuit has never addressed the question of an appeal from a portion of a remittitur order to which a party has agreed on a single cause of action, courts in other jurisdictions have rejected such attempted appeals. *E.g., Lanier v. Sallas*, 777 F.2d 321, 326 (5th Cir.1985) (where appeal is sought from the trial court's refusal to instruct the jury as to punitive damages on a single claim, and a remittitur has been filed as to another aspect of damages on that same claim, "acceptance of the remittitur must put an end to the litigation").

[5] Appellant NBC raises a myriad of issues in this appeal. NBC questions whether liability for defamation based on a

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term is defined in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 342, 345, 94 S.Ct. 2997, 3008, 3009, 41 L.Ed.2d 789 (1974) for purposes of this case[6] and therefore the First Amendment, as interpreted in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279-80, 84 S.Ct. 710, 725-26, 11 L.Ed.2d 686 (1964), precludes recovery unless Newton proved at trial by clear and convincing evidence that NBC and its journalists made a false, disparaging statement with "actual malice."

Actual malice consistently has been deemed subjective in nature, provable only by evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n. 30, 104 S.Ct. at 1965 n. 30; *see also Harte-Hanks*, 109 S.Ct. at 2685; *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S.Ct. 876, 880, 99

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false impression, as opposed to a false statement, may be imposed without contravening the First Amendment. NBC also asks us to consider whether the district court impermissibly allowed the jury to determine which statements in the broadcasts were ones of fact and not opinion and whether the district court violated provisions of the Jury Selection and Service Act in the selection of the jury. Appellant challenges the district court's denial of its motion for a change of venue and also raises numerous challenges to the computation of damages, including an attack on the law of our circuit regarding punitive damages in a First Amendment case. Because the actual malice issue disposes of this case in its entirety, we reach none of these questions.

[6] Newton strongly contested his public-figure status before the district court. The district court held Newton to be a public figure and imposed sanctions of $55,000 on Newton for requiring his public figure status to be proved.

L.Ed.2d 41 (1988); *see also St. Amant v. Thompson*, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.Ed.2d 262 (1968); *New York Times*, 376 U.S. at 279-80, 84 S.Ct. at 725-26. Even an extreme departure from accepted professional standards of journalism will not suffice to establish actual malice; nor will any other departure from reasonably prudent conduct, including the failure to investigate before publishing. Only the existence of "sufficient evidence to permit the conclusion that the defendant actually had a 'high degree of awareness of . . . probable falsity' " will suffice to meet the subjective test. *Harte-Hanks*, 109 S.Ct. at 2696 (quoting *Garrison v. Louisiana*, 379 U.S. 64, 74, 85 S.Ct. 209, 215, 13 L.Ed.2d 125 (1964)).

In this opinion, we assume, without deciding, that the broadcasts spoke in terms of fact, rather than opinion, and that at least one of these factual statements was false.[7] *See supra* at 666-667; *see also* special Verdict 4A,

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[7] There is some conflict among the circuits as to whether the element of falsity must be established by clear and convincing evidence or by a preponderance of the evidence. *Harte-Hanks Communications, Inc. v. Connaughton*, 491 U.S. 657, 109 S.Ct. 2678, 2682 n. 2, 105 L.Ed.2d 562 (1989) (comparing *Firestone v. Time, Inc.*, 460 F.2d 712, 722-23 (5th Cir.) (Bell, J., specially concurring), *cert. denied*, 409 U.S. 875, 93 S.Ct. 120, 34 L.Ed.2d 127 (1972) with *Goldwater v. Ginzburg*, 414 F.2d 324, 341 (2d Cir.1969), *cert. denied*, 396 U.S. 1049, 90 S.Ct. 701, 24 L.Ed.2d 695 (1970)). The *Harte-Hanks* court explicitly refused to consider this issue. 109 S.Ct. at 2682 n. 2.

The standard of review for the falsity element is also unresolved. The Court of Appeals in *Harte-Hanks* reviewed the jury's determinations of the operational facts bearing on falsity under the clearly erroneous standard of Rule 52(a). *Id.* at 2683

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SER251. We therefore review only the jury determination that NBC and three of its journalists acted with actual malice. After reviewing the evidence with the searching care required to protect First Amendment values, we conclude that Newton has failed to prove actual malice with "convincing clarity." *Bose*, 466 U.S. at 511, 104 S.Ct. at 1965.

II

We first consider the appropriate standard of appellate review of a jury's finding of actual malice. In reviewing the evidentiary record before us, we are particularly concerned about when and to what degree our responsibility under *New York Times* to review the record independently requires us to depart from the special deference with which we would normally treat each and every one of a jury's factual determinations.[8] As Justice

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n. 4 (quoting *Connaughton v. Harte Hanks Communications, Inc.*, 842 F.2d 825, 841 (6th Cir.1988)). The District of Columbia Circuit has held that whether speech is capable of defamatory meaning, however, is a question of law for the court. *See Tavoulareas v. Piro*, 817 F.2d 762, 779-80 (D.C.Cir.) (en banc), *cert. denied*, 484 U.S. 870, 108 S.Ct. 200, 98 L.Ed.2d 151 (1987). *See also* Restatement (Second) of Torts § 614(i), at 311 (1977).

[8] Federal Rule of Civil Procedure 52(a) provides:

> Findings of fact . . . shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge of the credibility of witnesses.

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Stevens noted in *Bose*, 466 U.S. at 498, 104 S.Ct. at 1958, the independent review standard and the clearly erroneous standard of Rule 52(a) "point in opposite directions." As we consider the direction in which we should proceed, our compass is the Supreme Court's decisions in *New York Times*, *Bose* and *Harte-Hanks*.

In *New York Times*, the Supreme Court established the constitutional rule that a public fixture such as Wayne Newton cannot recover damages for defamation without clear and convincing proof[9] that a false "statement was made with 'actual malice' – that is, with knowledge that it was false or with reckless disregard of whether it was false or not." 376 U.S. at 279-80, 84 S.Ct. at 726. The

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Appellate courts accord the same deference to the fact-finding function of the jury that Rule 52(a) mandates for trial courts. For example, in *Harte-Hanks*, the Supreme Court applied Rule 52(a) principles to its review of the credibility determination of a jury. 109 S.Ct. at 2696-97.

[9] The Supreme Court has recently noted that the "clear and convincing" standard of proof is a higher standard which reflects a societal judgment about the greater importance of particular types of adjudication. *Cruzan v. Director, Missouri Department of Health*, ___ U.S. ___, ___, 110 S.Ct. 2841, 2853-54, 111 L.Ed.2d 224 (1990). "The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.' " *Addington v. Texas*, 441 U.S. 418, 423, 99 S.Ct. 1804, 1808, 60 L.Ed.2d 323 (1979) (quoting *In re Winship*, 397 U.S. 358, 370, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970) (Harlan J., concurring)).

Supreme Court also mandated that in public figure defamation cases, we must " 'make an independent examination of the whole record' so as to assure ourselves that the judgment does not constitute a forbidden intrusion on the field of free expression."[10] *Id.* at 285, 84 S.Ct. at 729 (quoting *Edwards v. South Carolina*, 372 U.S. 229, 235, 83 S.Ct. 680, 683, 9 L.Ed.2d 697 (1963)). The requirement of independent appellate review established in *New York Times*, 376 U.S. at 285, 84 S.Ct. at 728, is a rule of federal constitutional law which "reflects" a deeply held conviction that judges . . . must exercise such review in order to preserve the precious liberties established and ordained by the Constitution. *Bose*, 466 U.S. at 510-11, 104 S.Ct. at 1965. Thus, "[t]he question whether the evidence in the record . . . is of the convincing clarity required to strip the utterance of First Amendment protection is not merely a question for the trier of fact."[11] *Id.* Rather, we must

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[10] This independent examination of the record is "not equivalent to a 'de novo' review of the ultimate judgment itself." *Bose*, 466 U.S. at 514 n. 31, 104 S.Ct. at 1967 n. 31. In de novo review, the reviewing court makes an original appraisal of all the evidence to decide whether or not judgment should be entered for the plaintiff. *Id.* As a general rule, we have conducted a de novo review of the record when the district court has held a restriction on speech to be constitutional. *Daily Herald Co. v. Munro*, 838 F.2d 380, 383 (9th Cir.1988).

[11] We note that the rule of independent review applies regardless of whether the factfinder is a jury or a trial judge. *Bose*, 466 U.S. at 501, 104 S.Ct. at 1959 (responsibility of independent review "cannot be delegated to the trier of fact, whether the factfinding function be performed . . . by a jury or by a trial judge"). *See also id.* at 509 n. 27, 104 S.Ct. at 1964 n. 27 ("The intermingling of law and fact in the actual-malice determination is no greater in state or federal jury trials than in federal bench trials").

simultaneously ensure the appropriate appellate protection of First Amendment values and still defer to the findings of the trier of fact.

The rule of independent review assigns judges a constitutional duty that cannot be delegated to the trier of fact; however, "it is not actually necessary to review the 'entire' record to fulfill the function of independent appellate review on the actual malice question. . . ." *Id.* at 514 n. 31, 104 S.Ct. at 1967 n. 31. The Supreme Court has stressed that the rule "is law in its purest form" under the constitution and our common-law heritage. *Bose*, 466 U.S. at 510-511, 104 S.Ct. at 1965. *See also New York Times*, 376 U.S. at 285, 84 S.Ct. at 728. Under the rule of independent review, we may accept all the purely factual findings of the district court and nevertheless hold as a matter of law that the record does not contain clear and convincing evidence that the NBC journalists prepared the October 6 broadcast with knowledge that it contained a false statement or with reckless disregard of the truth.

Although the clearly erroneous standard of Rule 52(a) requires us to defer to the jury's or trial court's factual findings, "the presumption of correctness that attaches to factual findings is stronger in some cases than in others." *Bose*, 466 U.S. at 500, 104 S.Ct. at 1959. Thus, although we generally review all purely factual findings for clear error, *see United States v. United States Gypsum Co.*, 333 U.S. 364, 394-96, 68 S.Ct. 525, 541-42, 92 L.Ed. 746 (1948), when we review evidence on the dispositive constitutional issue of actual malice, we are required to be

more discriminating in our deference.[12] The presumption of correctness carries its maximum force when we review findings of fact that turn on credibility determinations because of the factfinder's unique " 'opportunity to observe the demeanor of the witnesses.' " *Harte-Hanks*, 109 S.Ct. at 2696 (quoting *Bose*, 466 U.S. at 499-500, 104 S.Ct. at 1959). On the other hand, the presumption applies with less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences.[13]

But even when we accord credibility determinations the special deference to which they are entitled, we must nevertheless " 'examine for ourselves' " the factual record in full. *New York Times*, 376 U.S. at 285, 84 S.Ct. at 728 (quoting *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946). *See Harte-Hanks*, 109 S.Ct. at 2695. In sum, we read *Bose* and *Harte-Hanks* as creating a "credibility exception" to the *New York Times* rule of independent review. However, a determination of actual

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[12] Our independent review of actual malice has a peculiar twist. Actual malice involves a subjective analysis in which the trier of fact and the reviewing court discern the state of mind of the defamation defendant. A state of mind issue such as actual motive is a "pure question of fact" normally subjected to review under the "clearly erroneous" standard. *Pullman-Standard v. Swint*, 456 U.S. 273, 289, 102 S.Ct. 1781, 1790, 72 L.Ed.2d 66 (1982). *See also United States v. McConney*, 728 F.2d 1195, 1203 (9th Cir.) (en banc), *cert. denied*, 469 U.S. 824, 105 S.Ct. 101, 83 L.Ed.2d 46 (1984).

[13] The factfinding function includes "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513, 91 L.Ed.2d 202 (1986).

malice cannot be predicated on the factfinder's negative assessment of the speaker's credibility at trial. Although discredited testimony "does not rebut any inference of actual malice that the record otherwise supports, . . . it is equally clear that it does not constitute clear and convincing evidence of actual malice." *Bose*, 466 U.S. at 512, 104 S.Ct. at 1966.

Finally, we must evaluate the nature of Rule 52(a)'s restriction upon our independent review of jury credibility determinations in light of the fundamental First Amendment values at stake in public figure defamation cases. In *New York Times*, the case in which the Supreme Court mandated heightened appellate review of actual malice determinations, the Court was obviously concerned about its constitutional responsibility to protect First Amendment values from the prejudices of local juries against alien speakers.[14] Similarly, Wayne Newton's case poses the danger that First Amendment values will be subverted by a local jury biased in favor of a prominent local public figure against an alien speaker who

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[14] In *New York Times*, the Commissioner of Public Affairs for Montgomery, Alabama, brought a civil libel suit against the *Times* and four individual black civil-rights activists, including Dr. Martin Luther King, Jr. The publication at issue was a full-page advertisement entitled "Heed Their Rising Voices" and asked readers to contribute money to the Committee to Defend Martin Luther King and the Struggle for Freedom in the South. The advertisement charged that "in their efforts to uphold the[] guarantees [of the Constitution and the Bill of Rights], . . . [thousands of Southern Negro students] are being met by an unprecedented wave of terror by those who would deny and negate that document which the whole world looks upon as setting the pattern for modern freedom. . . ." *New York Times*, 376 U.S. at 256, 84 S.Ct. at 713.

criticizes that local hero. Such was the backdrop against which the Supreme Court decided *New York Times*, and it is the scenario we face here, sixteen years later. Although our case resembles *New York Times* in this respect, it differs from *Harte-Hanks*, in which the jury resolved a dispute between a local politician and a local newspaper, and *Bose* in which the plaintiff was an obscure corporation. Wayne Newton is a revered figure in Las Vegas.[15] His fellow citizens celebrate Wayne Newton Day and have named a major boulevard in his honor. As jurors, they awarded him $5 million in damages to reputation which "shocked the conscience" of the district court, precisely because the court itself determined that Newton's "outstanding reputation" had been unharmed by the stories. *Newton*, 677 F.Supp. at 1068.

We recognize that the risk of unbridled favoritism of local juries generally informs a decision about venue rather than standard of review.[16] However, in a case involving core First Amendment values, we cannot ignore the risk that a jury's credibility determinations

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[15] For example, Newton was named "Distinguished Citizen of the Year" in 1980 by the Clark County Chapter of the National Conference of Christians and Jews (RT 6:935) and at a Lincoln Day dinner in his honor in 1981, Newton was named the "Republican Man of the Year" in the state of Nevada (RT 8:1309).

[16] We note, however, that some courts have referred to the decision as to venue of public figure defamation cases as being of "constitutional stature." *Buckley v. New York Post Corp.*, 373 F.2d 175, 183-84 (2d Cir.1967); *Westmoreland v. CBS, Inc.*, 8 Media L.Rep. (BNA) 2493, 2496 (D.S.C.1982).

may also subvert those values. We must attempt to discharge our constitutional responsibility to protect First Amendment values without unduly trenching on the fact-finding role of the jury and trial judge. We are mindful that in *New York Times*, *Bose*, and *Harte-Hanks*, the Supreme Court was fashioning a process for reviewing the evidence which permits judicial protection of First Amendment values while still paying due deference to the fact-finding role of juries, and particularly the jury's opportunity to observe the demeanor of the witnesses. Striking the proper balance is a daunting task. Although many of the crucial facts bearing on the issue of actual malice are uncontroverted, we face a voluminous trial record. The Supreme Court has left us with a line drawn between highly deferential review of credibility determinations and less deferential review of the factfinder's evaluation of other evidence relevant to the actual malice issue.[17] The line is a thin one, but tread it we must to ensure that future speakers need not fear to rush in. As Justice Roberts wrote for the Supreme Court in *Cantwell v. Connecticut:*

> In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we

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[17] This is the line drawn by the First Circuit Court of Appeals in *Bose* when it held that its review of the actual malice determination was not limited to the clearly erroneous standard of Rule 52(a) but added that it was "in no position to consider the credibility of witnesses and must leave questions of demeanor to the trier of fact." *Bose Corp. v. Consumers Union of United States*, 692 F.2d 189, 195 (1st Cir.1982).

> know, at times, resorts to exaggeration, to vilification of men who have been or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy.

310 U.S. 296, 310, 60 S.Ct. 900, 906, 84 L.Ed. 1213 (1940).

III

Before conducting the independent review mandated by *New York Times*, *Bose*, and *Harte-Hanks* – a review in which we give special deference to the jury's and district court's credibility determinations but conduct a more searching review of other evidence germane to the actual malice determination – it is necessary to state in some detail the evidence on the actual malice issue.

For the most part, the facts in this case are not in dispute. Much of the evidence about the federal investigation involving Newton's possible connection to East Coast organized crime families is uncontroverted. This evidence falls into three categories: Newton's involvement with the Mafia, Newton's testimony before Nevada state gaming authorities, and the federal investigation of the Gambino family's efforts to enter the Las Vegas casino business.

Newton himself testified at trial about his relationship with Guido Penosi. Newton testified that his office calendar noted Guido Penosi's birthday, that Penosi had attended his brother's wedding, and that he had eaten a

dinner prepared by Penosi's wife at the couple's home. Reporter's Transcript (RT) at 3:408-10; 3:371-99; 6:974. Newton also performed on a television special without compensation for Penosi's son, arranged for Penosi to visit Las Vegas, and visited with Penosi for approximately 20 minutes at Newton's home.[18]

The most important contact between Newton and Penosi came in early 1980 when Newton alarmed about threats directed at both himself and his daughter by members of an organized crime syndicate, asked Penosi if he could stop the threats.[19] Penosi told Newton to call

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[18] Newton testified about Penosi's visit to his home at trial. That testimony went as follows:

"Q. And he [Penosi] then came to your house, did he not?

"A. The next day, yes, sir.

"Q. You sent a car for him?

"A. Yes, sir.

"Q. What's your best estimate of how long he was at your house?

"A. I would guess anywhere from 15 to 25 minutes, 15 minutes, 30 minutes, I don't know. (RT 6:987)

[19] Newton testified at trial as follows:

"Q. Now, before you called Guido Penosi [about the threats], did you even think of contacting any other body of law enforcement other than [Las Vegas] Metro . . . ?

"A. No. sir.

"Q. Did you even consider calling the FBI?

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Frank Piccolo and provided Newton with Piccolo's Connecticut phone number. Newton thereupon called Piccolo and explained his problem while Penosi listened on an extension phone.[20] FBI tapes recording telephone conversations between Piccolo and Penosi reveal that Piccolo arranged with members of the Genovese family, which was threatening Newton, to stop the threats.[21] Penosi

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"A. It wouldn't have helped.

"Q. You know that, Mr. Newton?

"A. Yes, sir.

"Q. You knew that then?

"A. No, sir." (RT 6:1015-16)

[20] Newton claimed ignorance as to the identity and location of the individual Penosi told him to call. He testified at trial as follows:

"A. So he [Penosi] called back. . . . And he said, 'When I call you back I'm going to give you a number, . . . a guy will answer, and I will be on the extension.' And he said, 'Simply tell him the story, nothing more, nothing less.' I said 'Okay.'

* * *

"I did call, a guy did answer, Guido was on the extension. I said, 'This is Wayne Newton.' And I related the entire story." (RT 3:441)

[21] The arrangements between the Gambino family and the Genovese family on behalf of Newton and Moreno, *see supra*, pp. 672-673, are the one event in the story of Wayne Newton's relationship with various persons involved in organized crime about which Newton himself did not testify. This information came from FBI tapes, which were played to the jury, and portions of the grand jury testimony, which were also released to the parties.

came to Las Vegas after the threats against Newton had ended. He visited with Newton in his dressing room and Newton thanked him for his help.

Around the same time, Mark Moreno, Newton's old friend and business advisor, began receiving threats. He went to Newton, who told Moreno to call Penosi. Penosi then told Moreno to call Piccolo. Moreno did so. A few days later, Penosi asked Newton to call Piccolo personally. Once again, Newton called Piccolo and asked for his assistance. In this call, Newton told Piccolo (as Penosi had told him to do) that Moreno was "with", Newton and was part of Newton's team.[22] Once again, Piccolo met with members of the Genovese family. At the meeting, agreement was reached for Penosi to pay $3,500 to have the threats against Moreno called off.

Having helped Newton out of his difficulties, by applying pressure, using personal contacts, and paying money, Piccolo sought to "earn" from Newton. First, he pressed Moreno to buy life insurance for Lola Falana, a Las Vegas entertainer managed by Moreno, and a friend

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[22] Newton testified as follows:

A. "Mark came to me and said, 'Guido called and you're to call this number and ask for Frank, and you're to tell him that Lola Falana is part of your team and Mark works for you.'

* * *

So I called the number again and I asked for Frank, and he said 'Yes.' And I said, 'This is just to let you know that Mark Moreno works for me. . . . '

* * *

He said 'Okay, that's all I need to know.' " (RT 6:870)

of Newton's through an insurance agent introduced to Moreno by Piccolo. Taped telephone calls between Piccolo and Penosi contain references to the Mafia's desire to "earn" from Newton, and to Piccolo's particular interest in the Aladdin.[23]

In July 1980, these taped telephone conversations came to the attention of Brian Ross and Ira Silverman, two NBC journalists who specialized in organized crime reporting. Ross and Silverman first learned that Piccolo was being investigated and that tapes existed of telephone conversations between Piccolo and Penosi and Mark Moreno. The conversations, the reporters learned, seemed to involve Wayne Newton and the Aladdin Hotel. Federal law enforcement officials were interested in investigating the connection between highlevel Mafia figures and Newton's contemplated purchase of the Aladdin. Ross and Silverman, too, became interested and started their own investigation.

At the same time, the Nevada gaming authorities were conducting their own investigation of Newton in connection with his application to own and operate the Aladdin. On a number of occasions in July and August 1980, Newton was interviewed by Nevada Gaming Board investigators. The tape of the August 27, 1980 interview was admitted into evidence in the defamation trial. In that interview, Newton, under oath, answered several

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[23] One taped telephone conversation contained the following exchange. Penosi: "they're throwing roadblocks and all that . . . you know . . . and, ah . . . they don't want him to have the hotel. . . . " Piccolo: "Yeah, but it would be nice if [Newton] would." Ex. 356 at 2; ER 195-96.

questions asked by a group of Gaming Board investigators led by Fred Balmer.

Balmer told Newton during the interview that Penosi was involved in organized crime.[24] According to Balmer, Newton "was asked very specific questions, based on the information that we had, with regard to his contacts with Mr. Penosi, and in addition to that he was asked if there had been any additional contacts or is there any other financial or business or any other contacts he had with relation to Mr. Penosi."[25] RT 11:1963-64. Newton told

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[24] Newton testified at trial as follows:

"Q. Did you believe Mr. Balmer that Mr. Penosi was involved in organized crime?

"A. I have no reason to consider it either way, Mr. Abrams.

"Q. Is it a matter of indifference to you?

"A. Relatively so, yes." (RT 6:1029)

[25] Mr. Balmer testified at trial as follows:

"Q. Did you ever . . . ask Mr. Newton to tell you every contact and every conversation he had ever had with Guido Penosi, in those words?

"A. No, not in those exact words. But he was asked very specific questions, based on the information that we had, with regard to his contacts with Mr. Penosi, and in addition to that he was asked if there had been any additional contacts or is there any other financial or business or any other contacts he had with relation to Mr. Penosi.

"Q. And he told you no business?

"A. That's correct, yes.

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Balmer that Penosi had seen him perform at the Copacabana Club in the early sixties and that he had had some contact with Penosi during the last six months after Newton had received threatening telephone calls. Newton professed to being unclear about how he had involved Penosi, however. "[E]ither Guido called me or I called him and I don't remember which . . . ," he told Balmer. Ex. 91 at 1; ER at 206 (transcript of taped interview). Somewhat later in the interview, Balmer said:

> And we are also aware that after you did contact Mr. Penosi, he made contact with an individual who is from back East in the New England states, ah Piccolo, who is heavily involved with organized crime, also. He did come to the Las Vegas area and our information is he did take care of these individuals for you.

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"Q. And he told you he did a – a something for charity for Penosi's son Anthony?

"A. Yes, after we had learned that, he told us that, yes.

* * *

"Q. [I]s it your best recollection that you gave Mr. Newton a fair chance to set forth the entirety of his dealings through the years with Guido Penosi?

"A. I would say that we gave him a more than adequate opportunity during the interviews that we conducted with him to tell us anything that he knew about Mr. Penosi, other than, you know, what we specifically knew and we specifically questioned him about." (RT 11:1963-64; 11:1968-69)

Ex. 91 at 7; ER at 206. To which Newton responded, "Well, if it did happen, ah, I don't know who that is and I'm still getting threats as of last week."[26] *Id.*

At the conclusion of Balmer's interviews with Newton, Balmer and his colleagues remained unaware of the following: Newton's sending a car to pick up Penosi

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[26] This testimony contradicts Newton's testimony at trial in which he stated that the threats had ended. RT 7:1046. Newton's response at trial to questions asking why he had not told Agent Balmer that he had spoken with any individual in the east at Penosi's request was as follows:

"Q. When Mr. Balmer said to you, Mr. Newton, that after you did contact Mr. Penosi he made contact with an individual who was back east in the New England states, did you tell him that, in fact, you had called someone in the New England states –

"A. No sir, I didn't.

"Q. – at the request of Mr. Penosi?

"A. No, sir, I didn't. I didn't know where I called.

"Q. You dialed an area code, Mr. Newton?

"A. Yes, sir.

"Q. You had no idea what part of the country the area code was in?

"A. No sir.

"Q. And when Mr. Balmer said to you, Mr. Penosi made contact with an individual who was from back east in the New England states, 'Piccolo' he called him, who was heavily involved in organized crime, why didn't you tell him that you had made two calls at Mr. Penosi's explicit request to someone else to help solve your problem?

"A. It didn't occur to me, Mr. Abrams." (RT 6:1030)

when Penosi came to Las Vegas; Penosi's visiting Newton's house; any meeting between Penosi and Newton after the threats against Newton stopped; and Newton's speaking with Frank Piccolo or anybody else at Penosi's request in an effort to stop the threats.

Meanwhile, Ross and Silverman continued to gather their own information. Here, an important conflict in the oral testimony emerged. Ross testified that upon his return to the East Coast, he learned from a knowledgeable, confidential source with whom he had worked both before and after the Wayne Newton story, that police in New York had learned, either through an undercover agent or a listening device planted at a well-known meeting place for members of the Gambino family, that Picolo's associates in the Gambino family had asked him if he wanted to go in with them in Atlantic City. Piccolo said he did not, because he had taken care of a problem for Wayne Newton and was going to have some sort of interest in the Aladdin Hotel.[27] At trial, Newton offered

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[27] Ross testified at trial as follows:

"Q. Reading from your deposition of September 3, 1982 . . .

Answer: Source three provided information that Frank Piccolo was a capo in the Gambino Mafia family who had been given the Connecticut territory to run for gambling, loansharking, and other mob rackets, that Piccolo had become very wealthy, had had a lot of money to invest.

Piccolo was a frequent visitor to the Ravenite Social Club in lower Manhattan, a known meeting place for the Gambino Mafia family.

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the testimony of two New York City police department officials who stated that, based upon a thorough search of

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And for more than a year the FBI had been investigating Frank Piccolo with other members of the Gambino Mafia family. On at least one occasion Mr. Piccolo was overheard to be in a conversation with other mobsters in which he was asked whether he would be interested in investing in Atlantic City in supposed mob rackets down there.

He said, no, he was involved with Wayne Newton in Las Vegas and he was going to be in the Aladdin, unquote.

Did you so testify?

"A. Yes, I did.

"Q. And was the testimony truthful?

"A. Yes it was.

* * *

"Q. Were you certain in your mind, when the broadcast was broadcast on October 6, 1980, that you had been told be a reliable source that Frank Piccolo had told associates that he had taken care of Newton's problem and had become a hidden partner in the Aladdin Hotel deal?

"A. I was certain of that. No doubt in my mind.

* * *

"Q. Isn't one source too few to broadcast a statement such as the last part of this statement, that Mr. Piccolo was saying he had become a hidden partner in the Aladdin Hotel deal?

"A. Not really, for two reasons.

One, this source is really a top quality source who Ira [Silverman] and I had worked with before and since, was very knowledgeable, just given his position.

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department records in which such information would be retained, no such overheard conversation came to the attention of the New York City Police Department.[28] On

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Secondly, other information that we heard tended to confirm what we were being told, that from the source called source B Ira was hearing that Piccolo was, in fact, telling mobsters in conversations that they were hearing on the phone that he had taken care of a problem for Wayne Newton, he was going to earn from the singer, he was going to earn from Newton, he was going to be involved in this life insurance policy. The information tended to – one set of information tended to confirm the other set of [information].

"Q. And why does that matter?

"A. It matters because nothing stuck out as a red flag, nothing suggested that it was wrong." (RT 27:5600-5601; 27:5603-5606)

[28] The following excerpt from Lieutenant John Ferguson's deposition was read to the jury at trial:

"Q. Was it contrary to the usual practice of the police department of the City of New York . . . to supply to a member of the news media information which pertained to or was reflected by the statement on television quote, police in New York say that this mob boss Frank Piccolo told associates he had taken care of Newton's problem and had become a hidden partner in the Aladdin Hotel deal, unquote?

"A. Yes.

"Q. If information had been obtained by the police department of the City of New York . . . which pertained to or was reflected by the statement made during a television broadcast on October 6, 1980, quote, police in New York say that this Mob Boss Frank Piccolo told associates he had taken care of Newton's problem and had become a hidden partner in the Aladdin Hotel deal, unquote, would that have been the type of

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cross-examination, however, one officer testified that while it would be contrary to policy and practice for a member of the Police Department to have had a conversation with Ross or Silverman about the kind of information in the broadcast, it is possible that members of the Police Department did so. RT 18:3601-04. The second officer went further, testifying that he assumed that members of the Police Department do talk to the press without advising the intelligence division. RT 22:4615.

Silverman also testified that he had a confidential source inside federal government, whom he called "source B." Silverman said he learned from source B that Piccolo and Penosi considered Newton to be a "mob asset" in Las Vegas. According to source B, Piccolo and Penosi were hoping to exploit their relationship with

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information which would have been reflected, contained, referred to or mentioned in a record, report, statement, memorandum or data compilation made and preserved by the police department of the City, of New York?

"A. If such information had been obtained it is the policy of the New York City Police Department to record such information.

"Q. Has a diligent search been made to find out whether there exists any [of the above-mentioned] records . . . ?

"A. Yes.

"Q. What has been the result of the search . . . ?

"A. A search was made of the records of the investigation and analysis section of the Organized Crime Control Bureau and no such recording or writing has been found." (RT 18:3591-93)

Wayne Newton and were trying to profit from that relationship. RT 23:4790-91. Silverman also testified that source B told him that Newton had not told Nevada gaming authorities the whole story about his relationship with Penosi. RT 23:4699-4700; 4702.[29]

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[29] Silverman testified as follows:

"Q. Do you recall attending the hearing of the Nevada State Gaming Control Board regarding Wayne Newton's licensure on Thursday, September 25, 1980?

"A. Yes, I do.

"Q. Do you recall listening to Wayne Newton's testimony when Board Member Mauldin asked Mr. Newton whether he, Mr. Newton, was planning to continue his relationship with Guido Penosi?

"A. Yes, I did.

"Q. I take it sir, you watched the out-take showing that question by Board Member Mauldin and the complete answer by Wayne Newton?

"A. A number of times.

"Q. So the language of Mr. Newton's answer in totality is fresh in your memory, correct, sir?

"A. I watched it. I think it's fresh.

"Q. Did you shortly after that hearing call source B and tell source B on the telephone that Wayne Newton had given testimony under oath before the Nevada State Gaming Control Board in which Wayne Newton had under oath denied any relationship with Penosi?

"A. I would think something like that, a relationship, yes.

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On September 25, 1980, the Nevada Gaming Board held a public hearing on Newton's application for a license to own and operate the Aladdin Hotel. Ross and Silverman attended the hearing as part of their investigation. In his sworn public testimony before the Gaming Board, Newton stated that he first met Penosi when he was sixteen or seventeen years old. He acknowledged seeing Penosi in Florida at Penosi's home but testified falsely that Penosi had never visited him at his home.[30]

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"Q. Did you in reliance on what source B answered you when you reported that to source B, whether it be man or woman, on the telephone, in part formulate the script language 'Federal authorities say Newton is not telling the whole story?

"A. In part, yes." (RT 23:4699-4700)

[30] "Gaming Board member [Mauldin]: Has he [Penosi] ever visited you in your home?

"Newton: No, sir." (RT 5A:50A; ER at 211).

Newton's explanation at trial of this false testimony was as follows:

"Q. Mr. Newton that was not true, was it?

"A. No, sir, not in the context in which you are stating it. It was true in the context in which I interpreted the question.

"Q. Mr. Penosi had come to your home, had he not?

"A. I sent a car for him, yes sir.

"Q. Mr. Penosi talked with you at your home?

"A. I assume we talked, yes, sir.

(Continued on following page)

Newton summed up his relationship with Penosi by stating:

> In the approximately 21 years from the time I met him, I might have seen this man four times. So, my relationship is just that of a fan, really.

RT 5A:49A-50A; ER 210. After he had been advised by a Gaming Board member that Penosi was a purported member of the Gambino organized crime family, Newton was asked if he were going to continue any relationship with him. Newton replied:

> Well, on the basis of which I have known him, I don't think that there has been a relationship, Mr. Mauldin. The direct answer to your question obviously is no if he has those kind of connections.

Id. at 50A-51A.

Newton also testified falsely before the Gaming Board that Mark Moreno was only a friend, that Moreno

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"Q. He stayed at your home for 20, 25, 30 minutes, I think you said?

"A. Approximately 15, 30 minutes, somewhere in there.

"Q. He went away from your home in the car that you had provided him."

"A. I didn't provide him a car. I provided him a ride. I believe I had someone pick him up and take him back."

"Q. You believe you told the whole story when you responded to the question has he ever visited you in your home and you said no, sir?

"A. In the context in which I understood the question, yes, sir." (RT 7:1114-15)

had no business or contractual position with him, and that Moreno was not his manager. In response to a specific question asking whether Moreno was "a representative of [his] in any way, shape or form," Newton replied that they had "[n]o association whatsoever." *Id.* at 58A-59A.[31] Moreno testified at trial that he had checked out one proposal to purchase the Aladdin and prepared a backup deal for another; arranged and attended meetings on Newton's behalf relating to the purchase of the Aladdin; sought potential partners for Newton; and drafted Newton's contract to become executive director of entertainment at the Aladdin.[32] RT 15:2784-93; 12A:30A.

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[31] Newton explained at trial that he understood the question from the Gaming Board asking him if Moreno was "a representative of [his] in any way, shape or form" to ask instead if he had a "contractual arrangement" with Moreno. RT 7:1089-90.

[32] Moreno testified at trial as follows:

"A. I was not employed by Mr. Newton at that time. I was not being paid by Mr. Newton, I was not asked for compensation. I was doing what I could as a friend and being in a position myself because of my long association with the Aladdin to put Mr. Newton where he wanted to be.

"Q. But you had been representing Mr. Newton in various matters that you have described to us, were you not?

"A. As I said before, I don't know if representing in the legal sense is a correct term. I was doing everything I possibly could so that Mr. Newton could purchase the Aladdin Hotel.

"Q. And what you were doing was very substantial in terms of your own time, was it not?

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At the Gaming Board hearing, representatives of the Valley Bank of Nevada also testified that the Valley Bank was providing financing to help Newton acquire his interest in the Aladdin. Newton, with financing from Valley Bank, planned to buy a 50 percent interest in the Aladdin and to commit to perform there at least 20 to 26 weeks a year. The Gaming Board concluded the hearing by recommending that Newton be licensed.

Immediately after the hearing, Ross sought to interview Newton. In response to questions from Ross, Newton falsely stated that he had last spoken with Penosi "maybe a year ago" and that Penosi had made no phone calls to him.[33] Ross followed Newton as Newton left the building in which the Gaming Board had met and walked to a car in the parking lot. At the car, Ross asked Newton about threats made upon his family, inquiring whether Penosi had ever been in Las Vegas to provide protection for Newton or his children. Frank Fahrenkopf, Newton's attorney, replied, "[c]ome on, that's silly." Fahrenkopf

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"A. I would say yes.

"Q. You were working round the clock at certain points at least to try to get the Aladdin for Mr. Newton, right?

"A. That's correct, sir." (RT 15:2793-94)

[33] At trial, Newton testified as follows about his response to Ross as to when he had last spoken with Penosi:

"Q. Was that true, Mr. Newton?

"A. No, it wasn't. But I didn't realize I was under oath to Mr. Wimp [Brian Ross] over there." (RT 7:1146)

and Newton offered no other answer or explanation. RT 5B:9B.

The granting of a license to operate a casino in Nevada requires approval from both the Gaming Board and the Nevada Gaming Commission. On September 26, 1980, the Commission held a hearing, approved the recommendation of the Gaming Board, and granted Newton a license to own and operate the Aladdin Hotel. At the hearing, Fahrenkopf submitted an affidavit signed by Newton stating that the affidavit was to "supplement the record in addition to the testimony made by Mr. Newton [before the Gaming Board] yesterday concerning" Penosi. In the affidavit, Newton disclosed that he had seen Penosi once in the last 13 years when Penosi had visited Las Vegas. The affidavit also stated that Newton had appeared on a television special produced by Penosi's son. The affidavit did not disclose Penosi's visit to Newton's home, or Newton's arrangements for Penosi to stay in one of his rooms at the hotel. The affidavit also failed to mention the calls to, conversations with, and meeting with Penosi during the death-threat episode.

In preparation for the October 6, 1980 broadcast, Ross and Silverman investigated some additional sources. On September 26, the journalists met with Johnny Carson, who had unsuccessfully bid for the Aladdin earlier. Ross and Silverman asked Carson questions about his earlier negotiation for the hotel. Although Penosi's name was mentioned during the interview, Carson had never heard of Penosi and could not offer any information about him.[34]

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[34] The following excerpt from Carson's deposition was read to the jury:

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The NBC journalists and Moreno testified that Ross and Silverman also interviewed Mark Moreno to discuss Moreno's and Newton's possible connections with Penosi and Piccolo. Moreno testified, and Ross agreed, that Moreno told Ross that the contacts between Penosi and Newton had nothing to do with the purchase of the Aladdin, but concerned death threats against Newton and his family. According to Silverman, Moreno said that there were local hoods in Las Vegas who had given Newton trouble.[35] Moreno also testified that he told the

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"Q. Is there anything else you recall these gentlemen [Ross and Silverman] saying to you?

"A. The name Penosi was brought up. I did not know the gentleman, had never heard of the name.

* * *

"Q. You remembered the name Penosi. What did they indicate to you?

"A. They didn't indicate anything to me. I didn't know the name or know the gentleman." (RT 16:3175; 16:3176)

Newton used this deposition testimony to insinuate that Ross and Silverman told Carson that Newton was involved with Penosi in the purchase of the hotel. Appellee's Brief at 79. By eliminating 20 lines of Carson's deposition testimony, Newton distorts the substance of Carson's remarks and suggests that the journalists tried to drop sinister references to Penosi into their questions about Newton's deal for the Aladdin.

[35] Moreno testified at trial about his conversation with Ross and Silverman as follows:

> They basically told me that I was not the crux of the story, and that Miss Falana was not the true crux of

(Continued on following page)

journalists that Penosi's involvement in stopping the threats directed at Newton and his family would be revealed in an affidavit being prepared by Fahrenkopf. That affidavit, as discussed earlier, did not mention any threats.

Ross and Silverman also sought to interview Newton, although there was conflicting testimony about the strength of their efforts to schedule the interview before the October 6 broadcast. The NBC journalists claim that they continually sought and were denied permission to interview Newton. Newton, on the other hand, testified that he did not know that NBC wanted to interview him about Penosi. RT 5:707-708. However, it is undisputed that Ross and Silverman made some attempts to interview Newton and that Newton rebuffed them at least once. For example, the testimony of Newton and his secretary, Mona Matoba, shows that when Silverman called to ask for an interview, Newton instructed Matoba to find out "what kind of story they wanted to do." RT 7:1097. According to Newton, his secretary told him that the journalists' answer had been "the Aladdin and Guido Penosi" and that when he was advised of that, Newton

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> the story. This was just to get my attention that who they really wanted to get was Wayne Newton. And if I would come down and speak to them about Mr. Newton's reported organized crime connections concerning his purchase at the Aladdin Hotel, that I would not in any way be implicated in their story, and Miss Falana would not in any way be implicated in their story. I refused to do that.

RT 14:2715-16.

told her to decline the interview. It is also undisputed that the journalists asked Moreno and a public relations executive named Ramon Hervey to help them arrange an interview with Newton.[36] Finally, it is undisputed that Ross actually interviewed Newton outside the hearing room in Carson City after Newton testified before the Gaming Board.

In sum, almost all of the facts reported by NBC in the October 6, 1980 broadcast are uncontroverted. Newton went to Penosi with a problem and Penosi called Piccolo who helped solve the problem. Piccolo and Penosi later discussed "earning off" Newton and possibly "earning off" his ownership of the Aladdin Hotel. Piccolo and Penosi were investigated and indicted by a federal grand jury, which heard the testimony of Wayne Newton. All these facts are beyond dispute.

IV

We now review the evidence to decide if it yields a clear and convincing basis on which the jury's verdict that NBC and its journalists made a false and defamatory statement about Newton, knowing that the statement was false or entertaining serious subjective doubt about the statement's truth, may be sustained. We conclude that the jury verdict cannot stand because the evidence fails to

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[36] Hervey testified that Silverman told him that Newton was a "hard guy to get to and I really would like to talk to him, just for a few minutes," RT 23:4688, and that Silverman was "persistent" in trying to enlist his assistance in getting an interview with Newton, *id.* at 4694.

prove constitutional malice with "convincing clarity." *Bose*, 466 U.S. at 511, 104 S.Ct. at 1965.

A

We begin by reviewing the basis for the district court's approval of the jury's actual malice finding. Although we review the district court's JNOV decision de novo, *see Peterson v. Kennedy*, 771 F.2d 1244, 1252 (9th Cir. 1985), *cert. denied*, 475 U.S. 1122, 106 S.Ct. 1642, 90 L.Ed.2d 187 (1986), we believe that opinion to be a helpful point of departure for our independent review of the actual malice evidence. The district court upheld the jury's liability verdict because

> [t]he clear and inescapable impression made by the broadcasts was that [Newton] did not have enough money to buy the Aladdin Hotel so he called a friend, Guido Penosi, who had ties to organized crime; and that Mr. Penosi helped him raise the money and thus obtained a hidden interest in the Aladdin Hotel.

Newton, 677 F.Supp. at 1067. The district court concentrated on what it believed to be the impression created by the broadcast that the Mafia obtained a hidden interest in the Aladdin by helping to finance Newton's acquisition of the hotel.[37] Like the district court, we do not tarry with

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[37] Because the district court did not identify any false statement of fact, or review of its ruling speaks in terms of the impression which the district court considered. By our review of the district court's ruling we do not suggest that liability may be imposed for false impressions arising out of true statements. As we noted earlier, we do not reach that question. *Supra* n. 5.

Newton's contention that actual malice is proven by NBC's statement that "federal authorities say that Newton is not telling [Nevada Gaming officials] the whole story."[38] We therefore turn to the district court's reasons for finding actual malice on the part of the NBC journalists in connection with the deal for the Aladdin.

The court offered two arguments in support of its ruling. Even if NBC had unintentionally left the impression that organized crime had financed Newton's purchase of the Aladdin, the court concluded, it "should have been foreseen" by NBC and the failure to foresee it "shows a reckless disregard for the truth." *Id.* at 1068. The court also concluded that since NBC had "voluntarily edited and combined the audio with the visual portions

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[38] The record is clear that Newton, in fact, did not tell the whole story to Nevada state gaming authorities. Newton's testimony before both the federal grand jury and the Nevada gaming authorities is a matter of public record. Assistant United States Attorney, Richard Gregorie, who represented the United States before the grand jury, testified at trial that, in his view, Newton had not told Nevada gaming authorities the whole story about his relationship with Penosi. RT 18:3498. And the record reveals that NBC's statement was accurate, even without attribution to federal authorities. For example, Newton falsely told the Board that Penosi had never came to his home or visited his dressing room. RT 6:987 (Newton testimony about Penosi's visit to Newton's home); RT 5A:50A; ER 211 (Newton testimony to Board that Penosi had never visited Newton's home); RT 7:1114-15 (Newton's trial testimony about testimony to Board). Silverman testified at trial that the ease with which Penosi gained access to Newton who was protected from most fans by a private body guard at his home and dressing room, aroused NBC's suspicion early in the investigation. RT 24:4699-4700; 4702.

of the broadcast in a way that created the defamatory impressions" and since those impressions were "clear and unescapable," the jury could reject as incredible the testimony of the NBC journalists that they had not intended to leave the false impression. *Id.* at 1067-68. Both of these rulings conflict with the principles of *New York Times* and *Bose*.

The district court erred in its ruling that an interpretation of the broadcast that "should have been foreseen" by the NBC journalists can give rise to liability. The district court's standard of what "should have been foreseen" is an objective negligence test while the actual malice test of *New York Times* is deliberately subjective. *Harte-Hanks*, 109 S.Ct. at 2696. The relevant inquiry asks whether a journalist "realized that his statement was false" or whether he "subjectively entertained serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n. 30, 104 S.Ct. at 1965 n. 30. Negligence, weighed against an objective standard like the one used by the district court, can never give rise to liability in a public figure defamation case. "A 'reckless disregard' for the truth . . . requires more than a departure from reasonably prudent conduct." *Harte-Hanks*, 109 S.Ct. at 2696. Accordingly, the district court erred in basing liability on an objective standard.

The district court also erred in relying on the proposition that the jury could have based a finding of actual malice on a determination that the journalists' testimony about their state of mind was not credible. In *Bose*, the Supreme Court held that:

> When the testimony of a witness is not believed, the trier of fact may simply disregard it. Normally the discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.[39]

Bose, 466 U.S. at 512, 104 S.Ct. at 1966; *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256-57, 106 S.Ct. 2505, 2514, 91 L.Ed.2d 202 (1986).

The district court's analysis is strikingly similar to that of the district court in *Bose*, the reversal of which was affirmed by the Supreme Court, 466 U.S. 485, 104 S.Ct. 1949, 80 L.Ed.2d 502 (1984). In *Bose*, the district court found that the author of an article had lied when he testified that the words he had used in an article about a stereo system meant something other than what the court interpreted them to mean. Since the witness was "an intelligent, well educated person" and since the words had "the same meaning for [the witness] as they do for the populace in general," the district court determined that the witness's testimony was not credible. *Id.* at

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[39] Similarly, in *Dyer v. MacDougall*, 201 F.2d 265, 268-69 (2d Cir. 1952), Judge Learned Hand held that a plaintiff could not meet his burden of proving that a defamatory statement had been made by showing that the jury disbelieved those who denied making it. Judge Hand stated that:

> Nevertheless, although it is therefore true that in strict theory a party having the affirmative might succeed in convincing a jury of the truth of his allegations in spite of the fact that all the witnesses denied them, we think it plain that a verdict would nevertheless have to be directed against him. *Id.* at 269.

511-12, 104 S.Ct. at 1965. The Supreme Court, in upholding the First Circuit's reversal of the district court's finding of constitutional malice, concluded:

> [The author of the article] of course had insisted 'I know what I heard.' The trial court took him at his word, and reasoned that since he did know what he had heard, and he knew that the meaning of the language employed did not accurately reflect what he heard, he must have realized the statement was inaccurate at the time he wrote it. 'Analysis of this kind may be adequate when the alleged libel purports to be an eyewitness or other direct account *of events that speak for themselves.' Time, Inc. v. Pape,* 401 U.S. [279], at 285 [91 S.Ct. 633, 637, 28 L.Ed.2d 45 (1971). See generally *The Santissima Trinidad,* 7 Wheat. 283, 338-339 [5 L.Ed. 454] (1822). Here, however, adoption of the language was 'one of a number of possible rational interpretations' of an event 'that bristled with ambiguities' and descriptive challenges for the writer. *Time, Inc. v. Pape, supra* [401 U.S.], at 290 [91 S.Ct. at 639]. The choice of such language, though reflecting a misconception, does not place the speech beyond the outer limits of the First Amendment's broad protective umbrella. Under the District Court's analysis, any individual using a malapropism might be liable, simply because an intelligent speaker would have to know that the term was inaccurate in context, even though he did not realize his folly at the time.

Id. at 512-13, 104 S.Ct. at 1966 (emphasis in original).

As *Bose* demonstrates and as *Harte-Hanks* reasserts, 109 S.Ct. at 2696 n. 35, constitutional malice does not flow from a finding that an "intelligent speaker" failed to describe the words he used as the finder of fact did. Nor is it permissible to uphold the jury's verdict against NBC

on the ground that, because the defendants are trained journalists (or, as in *Bose*, "intelligent speakers") or because the broadcast may be capable of supporting the impression Newton claims, NBC must therefore have intended to convey the defamatory impression at issue here.

Yet that ground, in the end, is the basis for the district court's ruling: since the implication it took from the broadcast was "clear and inescapable" to the court, it concluded that the jury could properly find that NBC and its journalists intended to leave that impression. Such an approach eviscerates the First Amendment protections established by *New York Times*. It would permit liability to be imposed not only for what was not said but also for what was not intended to be said.

The district court erred because it substituted its own view as to the supposed impression left by the broadcast for that of the journalists who prepared the broadcast. This substitution gave the trier of fact an expanded role which *New York Times*, *Bose*, and *Harte-Hanks* do not permit.

B

We now turn to the record and conduct our own independent review of the evidence to determine if it provides a clear and convincing basis for the jury's finding of actual malice.

1.

Newton argues that an inference of actual malice is raised by NBC's failure to mention in the October 6, 1980

broadcast the death threats as a possible explanation for his contact with Penosi. NBC replies that Newton's argument is irrelevant because mention of the death threats would not have lessened the defamatory impact of the broadcast.

We agree with NBC. A hypothetical broadcast comprised of both the information actually disclosed in the October 6, 1980 broadcast and the undisclosed possibility that Newton may have contacted the mob seeking protection from death threats would have been no less defamatory than the October 6, 1980 broadcast itself. We fail to see how disclosing the fact that Newton had appealed to the mob for such protection would have changed the defamatory impact of the broadcast. All the essential ingredients of the broadcast would have remained: the ongoing federal investigation; the fact that Newton had had financial difficulties; the fact that he had sought and obtained the assistance of organized crime; the fact that that assistance had included high level criminal figures helping Newton out; and the fact that those figures then spoke with each other about "earning" off Newton after he was licensed to run the Aladdin. The inclusion of the additional fact that Newton had contacted the mob seeking protection from death threats would not have changed the substance of the broadcast.

Even if we agreed with Newton that failure to mention the death threats increased the defamatory impact of the October 6 broadcast, that fact would not support an inference of actual malice because the evidence still fails to show with convincing clarity that the journalists acted with the requisite state of mind. The primary inquiry is

whether in failing to mention the death threats they "realized that [their] statement was false or that [they] subjectively entertained serious doubt as to the truth of [their] statement." *Bose*, 466 U.S. at 511 n. 30, 104 S.Ct. at 1965 n. 30 (citing *New York Times*, 376 U.S. at 280, 84 S.Ct. at 726).

Ross and Silverman testified that they did not have sufficient credible evidence to state in the first broadcast (as they did in later broadcasts) that threats had been made. The major source of the information that the "problem" Penosi and Piccolo had solved for Newton concerned threats against Newton and his family was Moreno, who the NBC journalists had decided was unreliable.[40] The question of Moreno's credibility poses the double-layered credibility dilemma faced by the Supreme Court in *Harte-Hanks*. In *Harte-Hanks*, the Supreme Court reviewed a jury finding of actual malice which involved conflicting oral testimony of two sorts: discrepancies in the testimony of the newspaper's witnesses, 109 S.Ct. at

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[40] Appellee argues that both source B and an agent of the Nevada Gaming Control Board told Ross and Silverman that Newton had contacted Penosi because of the death threats. However, the message conveyed by these sources, as recounted in the testimony of the agent, as well as that of Silverman and Ross, is quite ambiguous and couched in terms of a *possible* explanation for the Newton-Penosi contact. *See* RT 16:3038-39 (testimony of Agent Shepard); RT 23:4782-83 (testimony of Silverman); RT 25:5225-26 (testimony of Ross). Such statements cannot serve as support for a finding that the reporters' decision to refrain from making a statement in the broadcast constituted actual malice. Thus, we restrict our examination to the reporters' decision to discount Moreno's statement.

2694, and irreconcilable disagreement between the newspaper's sources. We face the same situation. Newton argues that the NBC journalists knew that he called Penosi and Piccolo with a security problem, not a financial one, and he predicates his argument on the assumption that the journalists should have considered Moreno a credible witness. In other words, Newton argues that because the journalists claimed that they found Moreno to be incredible, the jury must have concluded that the journalists were lying. This convoluted credibility assessment rests squarely before us because, like the jury in *Harte-Hanks*, and the Newton jury heard testimony from and observed the demeanor of both the journalists and the source, Moreno.

New York Times and its progeny protect journalists and publishers from liability based on errors of fact that arise from reliance on a credible source. In *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.Ed.2d 262 (1968), the Supreme Court held that a journalist who relies on a source whose reliability is unknown, has not published false information with actual malice if the journalist made some effort to verify the source's information. The Court in *St. Amant* reviewed a record which contained "no evidence . . . of [the source's] reputation for veracity" but nevertheless concluded that the defendant had not published false information with constitutional malice. 390 U.S. at 733, 88 S.Ct. at 1326. The Court suggested that reckless disregard for truth could be predicated on reliance "wholly on an unverified anonymous telephone call," *id.* at 732, 88 S.Ct. at 1326, but found that when the publisher had not deemed the source to be

"unsatisfactory," and had verified aspects of the information, *id.* at 733; 88 S.Ct. at 1326, there was no reckless disregard. *Id.* One of our colleagues has also noted the important free speech values inherent in a journalist's evaluation of a source:

> Newspapers and other media regularly digest a veritable avalanche of facts; these facts must be gathered from diverse sources, not all of equal reliability; judgments as to accuracy must often be made on the basis of incomplete information and under the pressure of a deadline. Newspapers might never be published if they were required to guarantee the accuracy of every reported fact; time and manpower do not permit the type of verification that would prevent all mistakes.

Masson v. New Yorker Magazine, Inc., 895 F.2d 1535, 1557 (9th Cir. 1989) (Kozinski, J. dissenting). We conclude that the importance of protecting a journalist's use of diverse sources and investigative techniques requires that we apply the heightened First Amendment standard of review to the question of Moreno's credibility in the eyes of the NBC journalists. Accordingly, we will not pay special deference to how the jury *may* have regarded Moreno's credibility as a trial witness.[41] The credibility of a source goes directly to the circumstances under which a journalist writes a story. The importance of permitting

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[41] *Harte-Hanks* supports this conclusion. There, the Court rejected the approach of the Court of Appeals, which had considered the facts which that jury "could have" found, and instead the Court concentrated on the less speculative ground of what the jury *"must"* have rejected. *Harte-Hanks*, 109 S.Ct. at 2697.

journalists to interview diverse sources, pursue multiple story lines, and draw their own honest and professional conclusions from their research dictates that the media should not fear that its journalists' professional judgments will be second-guessed by juries without the benefit of careful appellate review. As *New York Times* makes clear, "we 'examine for ourselves the statements in issue and the circumstances under which they were made.' " 376 U.S. at 285, 84 S.Ct. at 728 (citing *Pennekamp v. Florida*, 328 U.S. 331, 335, 66 S.Ct. 1029, 1031, 90 L.Ed. 1295 (1946)).

We find support for our conclusion in *Harte-Hanks*. In assessing the evidence of actual malice before the jury in that case, Justice Stevens, writing for the Court, drew his own conclusions about the credibility of the newspaper's source. He noted that "[t]he hesitant, inaudible and sometimes unresponsive and improbable tone of [the source's] answers to various leading questions raise obvious doubts about her veracity." *Harte-Hanks*, 109 S.Ct. at 2698. Accordingly, we hold that the credibility of a journalist's source is a separate inquiry from the credibility of the journalist himself and that we apply a heightened review to the evidence regarding whether the publisher was reckless or knowingly false when he relied upon information provided by his source.

In this case, the undisputed evidence shows that NBC and its journalists were not reckless in disregarding Moreno's information about threats. Ross and Silverman testified that they were uncomfortable with Moreno because they knew that federal and state authorities had investigated Moreno's own considerable connections

with organized crime figures. The journalists also testified that they believed Moreno to be an unreliable source because he had claimed that he had been intimately involved in the purchase of the Aladdin on behalf of Newton, in contradiction to Newton's testimony at the Board hearing that he had "no association whatsoever" with Moreno.[42] *Supra* p. 677. Newton's denial persuaded the NBC journalists to attach no weight to what Moreno had told them. This conclusion derives support from Moreno's statement to the journalists that Newton's affidavit would explain all relations with Penosi, when the affidavit contained only sparse information about the television special Newton had helped make for Penosi's son. *Supra* pp. 678-679. Finally, Newton's attorney, Fahrenkopf, who enjoyed an excellent reputation in the community and with NBC, flatly denied, in Newton's presence, that Penosi had protected Newton from threats. Regardless of whether the jury believed Ross and Silverman about their states of mind in considering the possibility of referring to threats in the broadcast, the uncontroverted facts about discrepancies between Moreno's information and the information the journalists heard from Newton or his representatives, negates a finding of reckless disregard for truth. Newton cannot fault NBC for relying on his own statements. As one court put it, "[I]t would be ironical and certainly inequitable for the

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[42] The ultimate fact that Newton was disingenuous in making this response does not alter the fact that Ross and Silverman had reason to believe that Moreno, rather than Newton, was lying. The actual-malice inquiry looks at circumstantial evidence of what the journalists knew rather than at circumstantial evidence of what turned out to be correct.

plaintiff to profit here from his own misstatements." *Friedman v. Boston Broadcasters, Inc.*, 13 Media L.Rep. (BNA) 1742, 1744 (Mass.Super.Ct.1986), *rev'd on other grounds*, 402 Mass. 376, 522 N.E.2d 959 (1988). We agree, and conclude that NBC's failure to refer to the threats in the October 6 broadcast fails to provide clear and convincing proof of actual malice.

2.

Newton also argues that the inclusion of a reference to his "financial problems"[43] in the October 6 broadcast suggests that NBC tried to bolster the idea that Piccolo had a hidden share of the Aladdin and so knowingly attempted to defame Newton. According to Newton, the fact that an early draft of the broadcast called his financial problems "serious" indicates that Ross and Silverman wanted to exaggerate his financial situation in order to suggest falsely that he had gone to the Mafia for money to help purchase the Aladdin. Newton offers NBC editor Gilbert Millstein's removal of the word "serious" from the final transcript as clear and convincing proof of actual malice.

We reject this argument on several grounds. First, the statement that authorities said that Newton had financial problems was true, and, as such, is incapable of supporting a finding of actual malice. The testimony of Glen Mauldin, a former member of the Nevada Gaming Board,

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[43] The October 6 broadcast stated "[d]espite his big income, authorities say Newton has had financial problems." *Supra* pp. 666-667.

shows that the Gaming Board was concerned about Newton's general financial situation, including his ability to finance his purchase and subsequent operation of the Aladdin. Prior to his purchase of the hotel, Newton was $75,000 a month short in meeting his current obligations. The Aladdin purchase involved adding an additional monthly obligation of $85,000.[44]

Second, it is undisputed that a disagreement over an amount not less than $20,000 caused a fight between

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[44] Mauldin testified at trial as follows:

"Q. At the rump session, Mr. Mauldin, did you make any statement with respect to the financial aspects of Mr. Newton's application?

"A. As I recall, I indicated that based upon my review and my staff's review of the financial information, Mr. Newton is having trouble meeting his current liabilities, and to add $85,000 a month to that could be very damaging to Mr. Newton's overall financial condition.

"Q. Did you understand at that time that Mr. Newton's income was very substantial?

"A. Yes. Very substantial. I think it was eight million, as I recall.

"Q. Did you hold the views you've just expressed notwithstanding that?

"A. A tremendous amount of expenses. He had – I was offering expenses for all of his properties. He had considerable obligations on most if not all of the properties he owned. There was expenses with regard to helicopters and airplane [sic]. He had borrowed a great deal of money just before that which appeared to be working capital. It appeared to me that he was having financial problems already." (RT 28:5804-05)

Newton and at least one low-level member of an organized crime family. It was this disagreement that precipitated the threats to Newton and his daughter. NBC points out that $20,000 is a significant sum and that a debt to a mobster which leads to death threats presents a serious problem. We agree with NBC that its choice of words was reasonable. Although there is arguably some ambiguity in the broadcast about the severity of Newton's financial difficulties, that ambiguity, alone, does not sustain the burden of establishing with clear and convincing clarity that the journalists acted with knowing or reckless disregard of falsity.

Finally, Newton's argument about the deletion of the word "serious" falls short of the mark. Editing to make a broadcast more understated and cautious cannot possibly be grounds for actual malice. The removal of the word "serious" has little, if any, probative value on the question of whether NBC knew that the statement in the broadcast was false. *Cf. Pierce v. Capital Cities Communications, Inc.*, 576 F.2d 495, 508 (3d Cir.), *cert. denied*, 439 U.S. 861, 99 S.Ct. 181, 58 L.Ed.2d 170 (1978) (fact that defendants, prior to broadcast at issue, considered charging plaintiff with using his public office for private gain and decided not to do so does "*not* demonstrate that they knew that utterances in the broadcast were of questionable validity"). To the contrary, as we demonstrate above, the statement appears to be accurate.

3.

Newton also claims that NBC published the statement "Piccolo told associates that he . . . had become a

hidden partner in the Aladdin" with actual malice because Ross and Silverman heard testimony at the Gaming Board hearing that the Valley Bank was providing the Aladdin financing. The knowledge that the Valley Bank was financing the Aladdin deal should have ruled out the possibility that Newton could have a hidden partner, or so Newton's argument goes. This argument is also wide of the mark. As the testimony of Newton's own organized crime expert, Prof. Robert Blakely, made plain, the fact that the Valley Bank provided financing for the Aladdin did not answer the question of whether any hidden interest existed. Prof. Blakely testified that a hidden interest in a casino is normally not actual ownership of a hotel but an interest in the "skim," the amount of casino receipts not reported to the appropriate authorities as receipts. Such an interest would not be reflected in corporate documents or materials "available for public surveillance and public review." RT 13:2417-19. Accordingly, the fact that Ross and Silverman knew about the Valley Bank financing has little probative value on the issue of the journalists' actual malice in stating that Piccolo claimed to be a hidden partner in the Aladdin.

4.

Newton also takes issue with several language choices and editing decisions made by the NBC reporters and editors. First, Newton objects to the wording of the sentence describing the grand jury investigation. Newton argues that NBC should have inserted the words "if any" or "possible" into the sentence "[a] federal grand jury is investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin." The broadcast would

then have referred to "Penosi's role, if any," or to "Penosi's possible role." Quibbles over the precise wording of a sentence Newton concedes is true do not contribute meaningfully to the actual malice inquiry. Although Newton is correct that the insertion of his suggested language would have sharpened the meaning of the sentence, the omission has minimal probative value on the issue of actual malice. The sentence does not mislead listeners about the nature of the grand jury's investigation.[45] Complaints or disagreements about choice of language are editorial decisions that do not give rise to liability. As the Eighth Circuit has observed, "the First Amendment cautions courts against intruding too closely into questions of editorial judgment, such as the choice of specific words." *Janklow v. Newsweek, Inc.*, 788 F.2d 1300, 1304 (8th Cir.), *cert. denied*, 479 U.S. 883, 107 S.Ct. 272, 93 L.Ed.2d 249 (1986). At the worst, NBC's sentence was

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[45] The transcript of Newton's grand jury testimony was produced to the parties at the commencement of the trial in October, 1986. Newton was asked a number of questions about whether there was any relationship between Penosi and Newton's purchase of the Aladdin:

> –"Does he [Penosi] have any business interests with you or financial?"
>
> –"Were you ever approached by anybody, either connected with Mr. Penosi or connected with this gentleman by the name of Frank, about their possibly assisting in the financing of the Aladdin?"
>
> –"Are there any points sold for the Aladdin now that aren't a matter of record with the Gaming Commission?"

Ex. 729 at 28-29, 31, 35; ER 224, 227, 228.

slightly ambiguous. Our circuit has barred the imposition of liability in a public figure defamation case based upon the use of ambiguous language. *Masson v. New Yorker Magazine, Inc.*, 895 F.2d 1535, 1544-45 (9th Cir.1989) (interpreting *Time, Inc. v. Pape*, 401 U.S. 279, 91 S.Ct. 633, 28 L.Ed.2d 45 (1971)). *See also McCoy v. Hearst Corp.*, 42 Cal.3d 835, 862, 727 P.2d 711, 729, 231 Cal.Rptr. 518, 536 (1986), *cert. denied*, 481 U.S. 1041, 107 S.Ct. 1983, 95 L.Ed.2d 822 (1987) (ambiguous evidence insufficient to establish constitutional malice).

Newton's complaints about two other NBC editing decisions fare no better. Newton objects to NBC's not including in the broadcast his entire response to a question asked of him at the Board hearing: "Are you planning to continue any relationship with Mr. Penosi?" The broadcast contained the first sentence of the answer: "Well, on the basis of which I've known him, I don't think there's been a relationship," but not the second sentence, "The direct answer to your question obviously is no if he has those kind of connections." RT 5A:50A-51A; ER 211; *supra* p. 677. Newton also objects to the broadcast's showing Newton's anger at Ross' questions in the parking lot without showing the earlier portion of the attempted interview which Newton claims provoked his anger. These objections challenge editing decisions by NBC about what material to include and exclude from the broadcast. Although the material included in the broadcast does not portray Newton in the most flattering light possible, that fact is irrelevant to the actual-malice inquiry. The challenged material was a true depiction of Mr. Newton's conduct during and after the Board hearing

and was relevant to the NBC story. We decline to substitute our judgment for that of NBC in presenting its story. Editorial decisions about broadcasts are best left to editors, not to judges and juries.

5.

Newton also alleges that Ross and Silverman did not try hard enough to interview him and that their lack of vigorous pursuit provides evidence that they did not want to hear his side of the story. In *Harte-Hanks*, the Supreme Court found that the newspaper had engaged in the "purposeful avoidance of the truth," 109 S.Ct. at 2698, by, *inter alia*, deliberately choosing not to interview a critical eye-witness and deliberately determining not to listen to a critical audio tape. In this case, however, it is undisputed that Ross and Silverman tried at least twice to interview Newton and that Ross did in fact interview him once. The record contains no evidence that the NBC journalists deliberately tried to avoid the truth as they investigated the October 6 broadcast.

6.

Finally, we address a general argument pertaining to the jury's determination of actual malice. Newton asks us to consider as we review the broadcast that television allows the media to interpose sound and picture over words and to manipulate the impressions it creates with powerful broadcasting technologies. Because the average viewer only watches a television broadcast once, that viewer cannot parse each sentence with care to ascertain each word's precise meaning. According to Newton, we

should refrain from carefully parsing each sentence because the overall impression of television is bound to images and not to words.[46]

Newton misperceives the function of appellate review in a First Amendment case. We do not review a publication for the purpose of replicating the review it would receive from the average reader or listener. We review speech that has been alleged to be defamatory to determine whether or not it falls outside the protection of the First Amendment. Accordingly, we evaluate facts that have been deemed to have constitutional significance. *See Bose*, 466 U.S. at 505, 104 S.Ct. at 1962. If we accepted Newton's suggestion, we would abdicate the constitutional responsibility embedded in the concept of judicial review. Reviewing a television broadcast less carefully because the average viewer sees it only once defies the constitutional values protected by the rule of independent judicial review.

V

In conclusion, we have applied the holding of the Supreme Court in *Bose* that the clearly erroneous standard of Rule 52(a) of the Federal Rules of Civil Procedure does not prescribe the standard of review to be applied in reviewing a determination of actual malice in a case governed by *New York Times v. Sullivan*. *Bose*, 466 U.S. at 514, 104 S.Ct. at 1967. Our review of the uncontroverted

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[46] We note in passing that it is exactly this type of careful parsing which Newton earlier requested that we require of NBC, *see supra* section IV B 4.

testimony, together with the cumulation of the circumstantial and documentary evidence, reveals almost no evidence of actual malice, much less clear and convincing proof. Accordingly, we REVERSE the judgment entered against appellants. Judgment should be entered dismissing the complaint. The cross-appeal is DISMISSED.

SO ORDERED.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CARSON WAYNE NEWTON, aka: WAYNE NEWTON, *Plaintiff-Appellee,* v. NATIONAL BROADCASTING COMPANY, INC.; BRIAN ELLIOT ROSS; IRA SILVERMAN; PAUL GREENBERG, et al., *Defendants-Appellants.*	No. 89-55220 D.C. No. CV-88-5848-MDC

CARSON WAYNE NEWTON, aka: WAYNE NEWTON, *Plaintiff/Cross-Appellant,* v. NATIONAL BROADCASTING COMPANY, INC.; BRIAN ELLIOT ROSS; IRA SILVERMAN; PAUL GREENBERG, et al., *Defendants-Cross-Appellees.*	No. 89-55285 D.C. No. CV-88-5848-MDC ORDER AND AMENDING OPINION AND DENYING REHEARING (Filed April 5, 1991)

Before: Alfred T. Goodwin, Chief Judge, Dorothy W. Nelson and William A. Norris, Circuit Judges.

ORDER

The opinion in the above-captioned case, filed August 30, 1990, is amended as follows:

1. Insert the following language in place of the headnote 8 paragraph on pages 9924-25:

> Newton argues that an inference of actual malice is raised by NBC's failure to mention in the October 6, 1980 broadcast the death threats as a possible explanation for his contact with Penosi. NBC replies that Newton's argument is irrelevant because mention of the death threats would not have lessened the defamatory impact of the broadcast.
>
> We agree with NBC. A hypothetical broadcast comprised of both the information actually disclosed in the October 6, 1980 broadcast and the undisclosed possibility that Newton may have contacted the mob seeking protection from death threats would have been no less defamatory than the October 6, 1980 broadcast itself. We fail to see how disclosing the fact that Newton had appealed to the mob for such protection would have changed the defamatory impact of the broadcast. All the essential ingredients of the broadcast would have remained: the ongoing federal investigation; the fact that Newton had had financial difficulties; the fact that he had sought and obtained the assistance of organized crime; the fact that that assistance had included high level criminal figures helping Newton out; and the fact that those figures then spoke with each other about "earning" off Newton after he was licensed to run the Aladdin. The inclusion of the additional fact that Newton had contacted the mob seeking protection from death threats would not have changed the substance of the broadcast.
>
> Even if we agreed with Newton that failure to mention the death threats increased the defamatory impact of the October 6 broadcast, that fact would not support an inference of actual malice because the evidence still fails to

> show with convincing clarity that the journalists acted with the requisite state of mind. The primary inquiry is whether in failing to mention the death threats they "realized that [their] statement was false or that [they] subjectively entertained serious doubt as to the truth of [their] statement." *Bose*, 466 U.S. at 511 n.30 (citing *New York Times*, 376 U.S. at 280).

2. Insert the following language as a footnote after the sentence ending on line 7 of the first paragraph under headnote 9, on page 9925:

> Appellee argues that both source B and an agent of the Nevada Gaming Control Board told Ross and Silverman that Newton had contacted Penosi because of the death threats. However, the message conveyed by these sources, as recounted in the testimony of the agent, as well as that of Silverman and Ross, is quite ambiguous and couched in terms of a *possible* explanation for the Newton-Penosi contact. *See* RT 16: 3038-39 (testimony of Agent Shepard); RT 23: 4782-83 (testimony of Silverman); RT 25: 5225-26 (testimony of Ross). Such statements cannot serve as support for a finding that the reporters' decision to refrain from making a statement in the broadcast constituted actual malice. Thus, we restrict our examination to the reporters' decision to discount Moreno's statements.

3. Page 9929: the subheading "2" should be moved to immediately above the headnote 13 paragraph.

With the above amendments, the panel unanimously votes to deny the petition for rehearing and to reject the suggestion for a rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing and no judge of the court has

requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED, and the suggestion for a rehearing en banc is REJECTED.

Paragraph from August 30, 1990 Slip Opinion of Ninth Circuit Court of Appeals Deleted by April 5, 1991 Order Amending Opinion [pp. 9924-9925]:

[8] Newton argues that the absence in the October 6, 1980 broadcast of any statement to the effect that Newton's calls to members of organized crime came about because of threats to him and his family evinces actual malice. According to Newton, the death threats offer an alternative explanation for his contact with Penosi other than the deal for the Aladdin. NBC replies that Newton's argument is irrelevant because the broadcast would have been no less defamatory if NBC had stated that Newton gave the Mafia a piece of the Aladdin in exchange for the Mafia's calling off death threats. The defamatory effect of the fact that Newton had received assistance from members of the Gambino family who were planning to "earn" off him after he purchased the Aladdin would remain unchanged despite more precise information about the nature of the assistance the Mafia offered. Although NBC is correct that the Mafia had done Newton a favor, regardless of the circumstances that prompted mob intervention, this argument is beside the point. In considering the question of actual malice, the primary inquiry is the journalist's state of mind and whether he "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement." *Bose*, 466 U.S. at 511 n.30 (citing *New York Times*, 376 U.S. at 280). We therefore examine the NBC journalists' reasons for excluding information about threats from the broadcast.

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

CARSON WAYNE NEWTON, aka WAYNE NEWTON, Plaintiff-Appellee, v. NATIONAL BROADCASTING COMPANY, INC.; BRIAN ELLIOT ROSS; IRA SILVERMAN; PAUL GREENBERG, et al., Defendants-Appellants.	No. 89-55220 D.C. No. CV-88-5848-MDC ORDER
CARSON WAYNE NEWTON, aka WAYNE NEWTON, Plaintiff/Cross-Appellant, v. NATIONAL BROADCASTING COMPANY, INC.; BRIAN ELLIOT ROSS; IRA SILVERMAN; PAUL GREENBERG, et al., Defendants/Cross-Appellees.	No. 89-55285 D.C. No. CV-88-5848-MDC (Filed Nov. 8, 1990)

Before: GOODWIN, Chief Judge, NELSON and NORRIS, Circuit Judges

Appellants are directed to file a response to the appellee's petition for rehearing and suggestion for rehearing en banc filed with this court on September 13,

1990, focusing on the points raised in the section appearing on pp. 11-12.

The response shall not exceed 15 pages, and shall be filed within 14 days of the date of this order.

SUPREME COURT OF THE UNITED STATES

No.

A-910

Carson Wayne Newton, aka Wayne Newton,

Petitioner

v.

National Broadcasting Company, Inc., et al.

ORDER

UPON CONSIDERATION of the application of counsel for the petitioner,

IT IS ORDERED that the time for filing a petition for a writ of certiorari in the above-entitled case, be and the same is hereby, extended to an including August 3, 1991.

/s/ Sandra D. O'Connor
Associate Justice of the
Supreme Court of the
United States

Dated this 4th
day of June, 1991.

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

CARSON WAYNE NEWTON, a/k/a WAYNE NEWTON, Plaintiff, vs. NATIONAL BROADCASTING COMPANY, INC., *et al.*, Defendants.	No. CV 88-5848 MDC (JRx)
	NOTICE OF APPEAL
	(Filed Feb. 27, 1989)

PLEASE TAKE NOTICE that defendants National Broadcasting Company, Inc., Brian Elliot Ross, Ira Silverman and Paul Greenberg hereby appeal to the United States Court of Appeals for the Ninth Circuit from each and every part of the Final Judgment entered in this action on the 10th day of February, 1989, except for those portions of the final Judgment (i) granting judgment *non obstante veredicto* to the defendants on the jury's awards to plaintiff of damages for lost past and future income, and (ii) granting sanctions against plaintiff pursuant to Rule 37(c) of the Federal Rules of Civil Procedure.

Dated: February 27, 1989

Respectfully submitted,

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CARSON WAYNE NEWTON a/k/a WAYNE NEWTON, Plaintiff, vs. NATIONAL BROADCASTING COMPANY, INC., a Delaware corporation, BRIAN ROSS, IRA SILVERMAN and PAUL GREENBERG, Defendants.	No. CV 88-5848 MDC (JRx) FINAL JUDGMENT (FILED FEB 9 1989)

This action came on for trial before the Court and a jury, Honorable Myron D. Crocker, District Judge, presiding and the issues having been duly tried and the jury having returned its special verdict, and defendants having moved to set aside the verdict and for judgment in favor of the defendants notwithstanding the verdict and in the alternative for a new trial and this motion having been fully briefed and argued before the Court and the Court having made its Decision and Order, entered November 18, 1987, granting in part and denying in part the said motion, and the Court having amended its Decision and Order by an Order entered December 28, 1988 and the plaintiff having filed on January 19, 1989 a Remittitur pursuant to said Order,

IT IS ORDERED AND ADJUDGED that judgment be entered in favor of the plaintiff Carson Wayne Newton, a/k/a Wayne Newton, and the plaintiff recover of all the defendants as follows:

1. As presumed damages to reputation $ 50,000.00

2. For physical and mental injury $ 225,000.00

IT IS FURTHER ORDERED AND ADJUDGED that in addition to the foregoing amounts plaintiff recover of defendant National Broadcasting Company, Inc. the sum of $5,000,000.00 as and for punitive damages.

IT IS FURTHER ORDERED AND ADJUDGED that the jury's awards to plaintiff of $7,900,000.00 for loss of past income and $1,146,750.00 for loss of future income be and the same hereby are set aside and judgment notwithstanding the verdict is granted to all the defendants on these jury awards.

IT IS FURTHER ORDERED AND ADJUDGED that plaintiff is awarded costs in the amount of $99,647.44 in accordance with Rule 54(d) of the Federal Rules of Civil Procedure and Rule 205 of the Rules of Practice of the United States District Court for the District of Nevada.

IT IS FURTHER ORDERED AND ADJUDGED that the foregoing amount of costs be offset by the amount of $55,323.90 which amount was granted by the Court as sanctions against plaintiff pursuant to Rule 37(C) of the Federal Rules of Civil Procedure for plaintiff's failure to admit his status as a public figure.

IT IS FURTHER ORDERED AND ADJUDGED that post-judgment interest and interest on costs shall accrue on the foregoing amounts from January 28, 1987, the date of the initial Judgment in this action, in accordance with Section 1961, Title 28, United States Code.

DATED this 6th day of February, 1989.

By /s/ M. D. Crocker
Judge

Approved this 6th day of
February, 1989.

/s/ M. D. Crocker
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE CENTRAL DISTRICT OF CALIFORNIA

CARSON WAYNE NEWTON, aka WAYNE NEWTON, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., *et al.*, Defendants.	No. CV-88-05848-MDC (JRx)

ORDER

(Filed Dec. 28, 1988)

By Order dated November 9, 1987, this court granted a new trial on the issue of damages only, in the Central District of California, unless plaintiff filed a remittitur of all sums except $225,000.00 for physical and mental injury, $50,000.00 as presumed damages to reputation, and $5,000,000.00 in punitive damages.

Plaintiff did not file the remittitur, so a hearing to determine the scope of the new trial was argued and submitted for decision.

After reviewing the authorities, the court is convinced that the issues of liability and damages are so intertwined that they should be determined by the same jury, and particularly as to punitive damages, where the extent of wrong doing by defendants is determined by their overall conduct.

Therefore, Plaintiff is given until February 1, 1989, to file a remittitur of all sums except $5,275,000.00, or the new trial, in the Central District of California, will be on all issues.

DATED: December 22nd, 1988.

/s/ M. D. Crocker
M. D. CROCKER
Senior United States District
Judge

Carson Wayne NEWTON, a/k/a Wayne Newton, Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC., a Delaware corporation, et al., Defendants.

No. CV-LV-81-180-MDC.

United States District Court,
D. Nevada.

Nov. 18, 1987.

Morton R. Galane, Las Vegas, Nev., for plaintiff.

Floyd Abrams, New York City, for defendants.

DECISION AND ORDER RE DEFENDANTS' MOTION FOR JUDGMENT NOTWITHSTANDING THE VERDICT AND IN THE ALTERNATIVE FOR A NEW TRIAL.

CROCKER, Senior District Judge.

Defendants' Motions for Judgment N.O.V., New Trial and Remittitur were argued and submitted on September 3 and 4, 1987, at Las Vegas, Nevada.

Defendants contend that they are entitled to Judgment N.O.V. because plaintiff failed to prove by clear and convincing evidence that the broadcasts in question were false or made with reckless disregard for their truth or falsity.

The Court is satisfied from its independent review of all of the evidence in this case that plaintiff has met his burden of proof by clear and convincing evidence.

A reckless disregard for truth or falsity requires that defendants have serious subjective doubts as to the truth

of the broadcasts. This state of mind can be established through the cumulation of circumstantial evidence.

Since the defendants voluntarily edited and combined the audio with the visual portions of the broadcasts in a way that created the defamatory impressions, the jury could properly find that defendants not only had serious subjective doubts as to the truth of the broadcasts, but also intended to defame the plaintiff.

The clear and inescapable impression made by the broadcasts was that plaintiff did not have enough money to buy the Aladdin Hotel so he called a friend, Guido Penosi, who had ties to organized crime; and that Mr. Penosi helped him raise the money and thus obtained a hidden interest in the Aladdin Hotel.

Defendants knew this impression was defamatory because giving anyone a hidden interest in a gaming casino is a violation of law, and as such is defamatory and not protected as a statement of opinion.

Defendants also knew this impression was false because Mr. Ross and Mr. Silverman had attended the hearing before the Nevada Gaming Board where the Valley Bank of Nevada established that it had provided the money for the plaintiff to purchase the Aladdin Hotel.

Defendants also knew this impression was false because Mr. Ross and Mr. Silverman had been told by Source "B", Mark Moreno and Agent Shepard that plaintiff called Guido Penosi because of death threats to his daughter and himself. This knowledge is corroborated by Mr. Ross asking plaintiff in the parking lot following the gaming board hearing on September 25, 1980: "Was he

[Guido Penosi] ever here to provide for protection or for the protection of your children?"

By creating the impression that plaintiff had a hidden partner in the Aladdin Hotel and not telling the gaming board about it when he was under oath, the broadcast inferred plaintiff had committed perjury which is also a violation of law.

The impression of a hidden interest in the Aladdin Hotel is further advanced by the statement in the broadcast, "A federal grand jury is now investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin."

Although defendants testified they did not intend the broadcasts to convey a defamatory impression, the evidence is such that the jury was entitled to reject their testimony as incredible and find that defendants must have had serious subjective doubts about the truth of the broadcasts.

The false and defamatory impression that plaintiff received financial help from organized crime to purchase the Aladdin Hotel, even if unintentional, should have been foreseen and shows a reckless disregard for the truth.

There are many other bits of evidence that convince the Court that plaintiff has shown by a cumulation of circumstantial evidence that defendants had serious subjective doubts as to the truth of the broadcasts, so defendants cannot escape liability. Therefore, defendants' Motion for Judgment N.O.V. is denied as to liability.

The evidence that defendants made the broadcasts with reckless disregard for their truth or falsity is some evidence of the "ill will and hatred" required to sustain punitive damages under Nevada Rev.Stat. § 41.333.

There is also other evidence of ill will such as the broadcasts that repeated the defamatory impression after plaintiff had asked for a retraction as well as the aggressive and hostile manner of Mr. Ross when he confronted plaintiff after the gaming board hearing on September 25, 1980. Also, Mr. Bunker, chairman of the Nevada Gaming Board, testified that Mr. Ross was unhappy, arrogant and accusatory when the board granted the gaming license to plaintiff. Further, the repeated statements of officials of N.B.C. that they "stand by the broadcasts" overcomes the idea of an honest mistake and bears on the issue of ill will and hatred.

The cumulation of circumstantial evidence supports the jury verdict as to punitive damages.

The jury awarded plaintiff $5,000,000.00 for damage to reputation. This award shocks the conscience of the court because the broadcasts did not tarnish his outstanding reputation. His reputation was not damaged with the Nevada Gaming Board because he received another license in 1982. His reputation was not damaged in the financial community because he borrowed $19,000,000.00 in 1982 for an investment in a resort in Pennsylvania. The Governor of Nevada and the Mayor of Las Vegas established Wayne Newton Day in December, 1981, to honor him, and the street from the airport in Las Vegas toward downtown was renamed Wayne Newton Boulevard. In 1981 he was named Republican Man of the Year in the

State of Nevada. After the broadcasts in question, plaintiff received the Presidential Medal of Freedom, he has dined at the White House with President and Mrs. Reagan, and was a guest at a state dinner at the White House for Prime Minister Gandhi of India. President Reagan chose plaintiff to be the Grand Marshal of the July 4, 1983, parade in Washington, D.C. and has visited plaintiff in his home in Las Vegas.

This is just some of the evidence that convinces the Court that plaintiff's reputation has not been damaged in the amount awarded by the jury.

However, the jury is entitled to award damages to reputation without proof that harm actually occurred, but it must be a reasonable amount or it will inhibit the exercise of free speech. The Court follows *Nevada Independent Broadcasting v. Allen*, 664 P.2d 337 (1983) [99 Nev. 404], and *Carol Burnett v. National Enquirer*, 7 Media L.Rptr. (BNA) 1321 (Cal.Super.Ct., 1981), 144 Cal.App.3d 991, 193 Cal.Rptr. 206 (1983), *appeal dismissed*, 465 U.S. 1014, 104 S.Ct. 1260, 79 L.Ed.2d 668 (1984), and holds that $50,000.00 is the maximum amount that can reasonably be presumed since the evidence shows that plaintiff still enjoys an outstanding reputation.

The jury awarded plaintiff $7,900,000 for loss of past income, and $1,146,750 for loss of future income.

Plaintiff claims that the defamatory broadcasts caused him to sell his interest in the Aladdin Hotel to his partner, Ed Torres, which terminated his performances at the Aladdin Hotel. This in turn caused him to entertain out of Las Vegas and although his gross income increased, his net income was less.

The uncontradicted testimony is that prior to the broadcasts, plaintiff was earning $165,000 per week; that three or four months after the broadcast of October 6, 1980, Ed Torres agreed to increase this to $200,000 per week; and at the time of trial, plaintiff was paid $250,000 per week.

The evidence established that the disagreement between plaintiff and his partner, Ed Torres, was over how to operate the Aladdin Hotel profitably, and had nothing to do with the broadcasts.

Therefore, plaintiff has failed to establish by a preponderance of the evidence that the broadcasts in question had any causal connection to any alleged loss of past or future income, and these awards are set aside, and judgment N.O.V. is granted to defendants on these damage claims.

The jury awarded plaintiff $225,000 for physical and mental suffering. There is ample evidence in the record that plaintiff was very upset over the broadcasts, and was treated for an ulcer attributed to the stress and psychic trauma caused by the broadcasts, so the award is supported by the evidence. The amount, although large, is not unreasonable.

The jury awarded plaintiff $5,000,000 in punitive damages against the defendant National Broadcasting Company, Inc. The award is supported by the evidence, and since NBC has a net worth of $2 billion, the award is not so excessive as to shock the conscience of the Court.

Since the jury awards of some of the damages are excessive and against the weight of the evidence, defendants' motion for a new trial will be granted, and a new trial ordered on the issue of damages, only, in the Central District of California, unless plaintiff files a remittitur within sixty (60) days of all sums except $225,000 for physical and mental injury, $50,000 as presumed damages to reputation, and $5,000,000 in punitive damages.

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

CARSON WAYNE NEWTON, a/k/a WAYNE NEWTON, Plaintiff, v. NATIONAL BROADCASTING COMPANY, INC., a Delaware corporation, BRIAN ROSS, IRA SILVERMAN and PAUL GREENBERG, Defendants.	CV-S-81-180-MDC SPECIAL VERDICT (Filed Dec. 18, 1986)

WE, THE JURY IN THE ABOVE-ENTITLED CASE, UNANIMOUSLY FIND AS FOLLOWS:

Question 1.

Has Mr. Newton proved by a preponderance of the evidence, as that term has been defined by the Court, that any impression or statement about him conveyed by one or more of the three broadcasts complained of was defamatory?

Yes ✓

No _

If your answer to Question 1 is no, please answer no further questions.

Question 2.

If your answer to Question 1 is yes, has Mr. Newton proved that any defamatory impression or statement

about him conveyed by one or more of the three broadcasts complained of was an impression or statement of a factual nature as opposed to opinion?

Yes ✓

No _

If your answer to Question 2 is no, please answer no further questions.

Question 3.

If your answers to Questions 1 and 2 are yes, has Mr. Newton proved by clear and convincing evidence, as that term has been defined by the Court, that any defamatory impression or statement of a factual nature about him conveyed by one or more of the three broadcasts complained of was false?

Yes ✓

No _

if your answer to Question 3 is no, please answer no further questions.

Question 4A.

If your answers to Questions 1, 2, and 3 are yes, has Mr. Newton proved by clear and convincing evidence that any false and defamatory statement of a factual nature about him was stated in one or more of the three broadcasts complained of with knowledge of falsity or with serious subjective doubt about its truth on the part

of any of the defendants? If so, which of the individual Defendants?

1. Brian Ross Yes ✓ No _
2. Ira Silverman Yes ✓ No _
3. Paul Greenberg Yes _ No ✓

Please now go to Question 4B.

Question 4B.

If your answers to Questions 1, 2, and 3 are yes, has Mr. Newton proved by clear and convincing evidence that one or more of the defendants intended that one or more of the three broadcasts complained of would convey a false and defamatory impression of a factual nature about Mr. Newton and that one or more of the individual defendants had knowledge of falsity or had a serious subjective doubt about the truth? If so, which of the individual Defendants?

1. Brian Ross Yes ✓ No _
2. Ira Silverman Yes ✓ No _
3. Paul Greenberg Yes ✓ No _

If your answers to both Questions 4A and 4B are no, please answer no further questions.

Question 5.

If you have answered yes to Questions 1, 2, 3 and either 4A or 4B, please set forth the amount which you find plaintiff is entitled to recover against all the defendants for damages caused by one or more of the broadcasts.

1. Reputation $5mm.
2. For physical and mental suffering $225m.
3. Loss of income $7.9mm.
4. Loss of future income $1,146,750.

Question 6.

If you have answered yes to questions 1, 2, 3 and either 4A or 4B and awarded damages under question 5, has Mr. Newton proved by a preponderance of the evidence that one or more of the individual defendants harbored ill will or hatred toward him and intended to injure him.

Yes ✓ No _

If your answer is yes, please state the amount plaintiff should receive from Defendant NBC as exemplary or punitive damages. $5mm.

December 17, 1986 /s/ William C. McGee
Date Foreperson

[TRANSCRIPT OF OCTOBER 6, 1980 BROADCAST]
[PLAINTIFF'S EXHIBIT 258]

VIDEO	AUDIO
1 – Medium shot, car parked at intersection, camera moves in on rear window, two men are seen inside :12	This is Palm Drive in Beverly Hills, California. There are two men in this car, detectives from the District Attorney's office, on a stakeout in an organized crime investigation.
2 – Medium shot, two men emerging from house, camera moves in close on one who walks around car, gets in :21	The man they are watching, Guido Penosi, who says he is a roofing salesman State and federal authorities say Penosi is a New York hoodlum from the Gambino Mafia family, a man with a long criminal record, now believed to be the Gambino family's man on the West Coast, in the narcotics business and also in show business.
3 – Medium shot, Brian Ross with Aladdin hotel in background :17	Penosi is now a key figure in a federal grand jury investigation of the activities of the Gambino Mafia family in Las Vegas. An investigation that involves one of the big casinos here, the Aladdin; and one of Las Vegas' top performers, singer Wayne Newton.

4 – Front view, Wayne Newton on stage singing :13

(sound up briefly, Newton singing, then narration resumes)

Newton is said to make a quarter of a million dollars a week for his nightclub act, and late last month Newton and a partner were given state approval to buy the Aladdin Hotel in Las Vegas for

5 – Rear side shot, three women on stage, Newton crosses in front, camera moves in on him alone :09

85 million dollars. A federal grand jury is now investigating the role of Guido Penosi and the mob in Newton's deal for the Aladdin.

6 – Front view, Newton singing :03

Despite his big income, authorities say Newton

7 – Freeze frame, same shot :07

has had financial problems. Investigators say that last year,

8 – Freeze frame of Newton recedes to left side of screen, is joined by freeze frame of another man :08

just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem. Investigators say whatever the problem was, it was

9 – Closeup, still photo of two men, camera moves in close on man on right :15

important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank

Piccolo, told associates he had taken care of Newton's problem, and had become a hidden partner in the Aladdin Hotel deal.

10 –Closeup, Newton taking oath :11

At a hearing of the State Gaming Board, Wayne Newton said he had no hidden partners, and Newton said under oath that he knew Guido Penosi –

(sound up as Newton says)

I do. **(narration resumes)** but that Penosi was just

11 –Medium shot, board members :02

a fan and a longtime family friend.

12 –Closeup, Newton testifying :19

(board member asks) Did you know that he is a purported member of the Gambino organized crime family?

(Newton answers) No sir, I did not.

(board member asks) Are you planning to continue any relationship with Mr. Penosi?

(Newton answers) Well, on the basis of which I've known him, I don't think that there has been a relationship.

13 –Tracking shot, Newton and party go down stairway and into corridor :08

(narration resumes)

Federal authorities say Newton is not telling the whole story, and that Newton is expected to be one of the first witnesses in the grand jury investigation.

14 –Tracking shot, outside as Newton crosses parking area to car :13

Newton become angry when we tried to talk to him about his relationship with Guido Penosi.

(Newton) I really don't care what you want.

(Brian Ross, off camera) Pardon me?

(Newton) I said I really don't care what you want.

(Brian Ross, off camera) I'd like to talk to you about Guido Penosi –

(Newton) Go ahead and talk.

(Brian Ross, off camera) and your relationship with him.

15 –Medium close tracking show, man moves past camera from car, toward house :11

(narration resumes)

Guido Penosi told us **(man camera is following gestures toward camera and says "Get lost." This is background sound, low audio level)**

	he doesn't know anyone named Wayne Newton. Federal authorities say they know of at least 11 phone calls Penosi made to Newton's house in one two-month period,
16 –Medium shot as man, back to camera, enters house and closes door :20	and authorities say those phone calls and Penosi's relationship with Newton and other entertainment figures are now part of a broad year-long FBI investigation of the investment of East Coast mob money from narcotics and racketeering into the entertainment business in Las Vegas and Hollywood. Brian Ross, NBC News, Los Angeles.*

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* For the purpose of clarity in this printed Appedix, bold type was used in the Audio section parenthetical references in place of the original italicized type.

[PLAINTIFF'S EXHIBIT 560]

LAW OFFICES
FAHRENKOPF MORTIMER SOURWINE MOUSEL & SLOANE
333 MARSH AVENUE
P.O. BOX 460
RENO, NEVADA 89504
October 10, 1980

FRANK J. FAHRENKOPF, JR.
WAYNE L. MORTIMER
JULIEN G. SOURWINE
DAVID L. MOUSEL
DOUGLAS A. SLOANE
DOUGLAS R. HILL
FRANN MOORE

TELEPHONE
AREA CODE 702
328-8863

National Broadcasting Company
30 Rockefeller Plaza
New York, New York 10020

Gentlemen:

On October 7, 1980, the NBC Television Network broadcast a story about our client Wayne Newton, entitled "Wayne Newton and the Law", a transcript of which is attached hereto. Said story was and is untrue and slanderous in that the context of said broadcast, among other things:

1. Alleges and/or asserts that the financing of Mr. Newton's acquisition of his interest in the Aladdin Hotel and Casino, Las Vegas, Nevada, was obtained by and through "Mafia" and "Mob" sources and that Mr. Newton holds a "Hidden" ownership interest in said Aladdin Hotel and Casino for the benefit of said "Mafia" and "Mob" sources;

2. Alleges and/or asserts that Mr. Newton has not truthfully related to Nevada Gaming

Authorities the facts of his relationship with Guido Penosi and that Wayne Newton is associated with Guido Penosi who is involved in both narcotics business and show business on the West Coast;

3. Visually depicts Wayne Newton testifying, under oath, before Nevada Gaming Authorities and in connection with said testimony states that "Federal Authorities say Newton is not telling the whole story."

Demand is hereby made, pursuant to Nevada Revised Statutes Section 41.336 and California Civil Code Section 48a, that you immediately broadcast a correction of said story in substantially as conspicuous a manner as was the above-stated story, on the same program, and that in said story of correction, you state:

1. That Mr. Newton's acquisition of his interest in the Aladdin Hotel and Casino is financed totally through a loan to him personally from Valley Bank of Nevada, Nevada's second largest bank;

2. That Nevada Gaming Authorities have investigated fully Mr. Newton's relationship with Guido Penosi and are satisfied that Mr. Newton has truthfully and fully testified regarding said relationship;

3. That Wayne Newton is not "associated with Guido Penosi" in either "the narcotics business" or "show business on the West Coast", or elsewhere.

This notice and demand is being served upon you within twenty days of knowledge of said broadcast.

FAHRENKOPF MORTIMER
SOURWINE MOUSEL &
SLOANE
333 Marsh Avenue
Post Office Box 460
Reno, Nevada 89504

By /s/ Frank J. Fahrenkopf, Jr.
Frank J. Fahrenkopf, Jr.

and

WYMAN, BAUTZER,
ROTHMAN,
KUCHEL & SILBERT
2049 Century Park East
Los Angeles, California 90067

By /s/ Gregson Bautzer
Gregson Bautzer

FF/bf
Enclosure

REGISTERED MAIL
RETURN RECEIPT REQUESTED

[PLAINTIFF'S EXHIBIT 564]

NBC

National Broadcasting Company, Inc.

Thirty Rockefeller Plaza
New York, NY 10020 212 664 2057

J Marshall Wellborn
Law Department
Assistant General Attorney

October 27, 1980

Frank J. Fahrenkopf, Jr., Esq.
Fahrenkopf Mortimer Sourwine Mousel & Sloane
333 Marsh Avenue
Post Office Box 460
Reno, Nevada 89504

and

Gregson Bautzer, Esq.
Wyman, Bautzer, Rothman, Kuchel & Silbert
2049 Century Park East
Los Angeles, California 90067

Gentlemen:

This is a response to the retraction demands you have made upon NBC and those of its affiliates to whom you have sent letters who carried the NBC NIGHTLY NEWS broadcast concerning Wayne Newton on Monday, October 6, 1980.

We believe that your letter inaccurately characterizes what NIGHTLY NEWS actually stated in the broadcast. NIGHTLY NEWS did not state that Mr. Newton had acquired his interest in the Aladdin Hotel and Casino through "Mafia" or "mob" sources, that Mr. Newton had untruthfully related to Nevada gambling authorities the facts of his relationship with Guido Pinozi, or that he is

associated with Pinozi in the narcotics or show business on the West Coast. What the report did state is:

> "Federal authorities say Newton is not telling the whole story and that Newton is expected to be one of the first witnesses in the grand jury investigation."

We would like you to know that we have carefully reviewed the NIGHTLY NEWS script and have concluded that the report was accurate and newsworthy. For this reason, on behalf of NBC and its affiliates carrying the report, we decline to air the retraction demanded in your letter.

Sincerely yours,

/s/ J. Marshall Wellborn
J. Marshall Wellborn

JMW:cw

[TRANSCRIPT OF PORTION OF PRELIMINARY AUDIO FOR OCTOBER 6, 1980 BROADCAST, BEFORE FINAL EDITING]
[PORTION OF EXHIBIT 255]

[2] MR. BRIAN ROSS: Investigators say despite his big income Newton has had serious financial problems, and that last year just before he announced he would buy the Aladdin Guido Penosi got involved in Newton's affairs, and sent word to mobsters on the east coast to help take care of Newton's money problems.

Investigators say that in one two-month period there were more than a dozen phone calls back and forth between Penosi's house and Newton's house, and that at the same time police in New York City learned that a high-ranking member of the Gambino Mafia family, Frank Piccolo, was telling associates he had taken care of Wayne Newton's money problems and had become a hidden partner in the Aladdin Hotel deal.

(end of tape)

[PLAINTIFF'S EXHIBIT 105]

MEMORANDUM

DATE: September 12, 1980

TO: GARY REESE, SUPERVISOR SIIB

FROM: AGENTS SHEPARD AND DORSEY

SUBJECT: WAYNE NEWTON

On September 5, 1980, Agent Shepard arranged a meeting with an IRS confidential source regarding the Aladdin investigation. The source is an investigative reporter for a major television network. The source was to supply information linking Wayne Newton to known O. C. figures.

On September 11, 1980, Agents Dorsey and Shepard met with an IRS Agent and two confidential sources introduced as investigative reporters. After the introduction one source opened a book called "The Canadian Connection" and displayed a photograph of Guido Penosi and a brief history of Penosi. The sources began asking the Agents about Penosi's involvement and relationship to Wayne Newton. It was apparent from the start that the sources were on a "fishing expedition" to confirm information they had. They were aware Penosi had been interviewed by Board Agents and wanted to know Penosi's explanation for knowing Newton. They also wanted to know where the interview took place and the present location of Penosi.

Agent Shepard then asked the sources how Newton was tied to O. C. figures. It had been previously reported to

Board Agents that these sources had that information. The sources stated they weren't really sure but they had heard Newton was being blackmailed for gambling debts and sex habits. Agents tried to pin the sources down to what gambling debts or sex habits Newton was being blackmailed for and by whom. The sources stated they didn't know but possibly by Frank Piccolo a Connecticut O. C. figure.

The sources stated they had knowledge of a Title III presently underway linking Mark Moreno (a close friend of Newton's) to Piccolo. They had heard that Piccolo through Moreno had control over Newton and the Aladdin.

Agent Dorsey then asked the sources what kind of information they had. The sources stated that Piccolo at an unknown time and date had met Newton in Florida. They could not give a location in Florida or what the meeting was about. (It should be noted that during Newton's interview by Board Agents he disclaimed any knowledge of Frank Piccolo). The sources state Penosi is Piccolo's cousin. The sources then stated that Penosi had called Newton several times between February and May of 1980, and that Newton had called Penosi. The sources realized they were gaining no information from the Agents and they stated that a current Grand Jury in the East will be issuing subpoenas for a large group of persons in the Las Vegas area including Newton regarding O. C. ties on the East Coast.

They further stated that licensing Newton for the Aladdin would be very embarrassing for the Board and the state.

They also stated that they were working on an investigative report for a national news show regarding Newton, the Aladdin and O. C. figures, which would air nationwide in the next few weeks.

Agents realizing what was transpiring asked the sources what they wanted. They stated they wanted Penosi's and Newton's phone numbers. Agents asked what they could expect in return for the information. The sources stated they could *possibly* provide the proof of a meeting by Newton and Piccolo in Florida. Agents informed the sources that they would need permission from their supervisor to provide this information. (Agents had no intention of giving any information to the sources, but this method gave Agents a chance to conclude the interview). The interview was concluded at this time.

AGENT'S COMMENTS

It is the opinion of the Agents that the IRS sources possessed a large amount of information regarding Newton, his activities and the Aladdin Hotel.

Agents believed the sources were trying to confirm information they had obtained from other sources.

/s/ Joe Dorsey
Joe Dorsey Agent

/s/ Lon Shepard
Lon Shepard, Agent

JD/LS:nw

[TRANSCRIPT OF AUDIO PORTION FROM UNEDITED VIDEOTAPE FOOTAGE, SHOWN AT TRIAL, OF EVENTS DURING NEWTON'S TESTIMONY AT GAMING BOARD HEARING AND HIS ENCOUNTER WITH ROSS AND SILVERMAN FOLLOWING HEARING]
[PLAINTIFF'S EXHIBIT 746]

BUNKER: Mr. Newton, would you please come forward.

NEWTON: Yes, sir.

BUNKER: Miss Norris, would you please swear Mr. Newton in.

NORRIS: Do you solemnly swear that the testimony you are about to give in this matter pending before the State Gaming Control Board will be the truth, the whole truth and nothing but the truth so help you God?

NEWTON: I do.

BUNKER: Mr. Mauldin.

MAULDIN: Mr. Newton, through the course of this investigation we have had a pretty good opportunity to become aware of your cash flow both from and income and and outgo standpoint and it's always been my concern ever since you began discussing the Aladdin as becoming one of your assets that – I was wondering from the very beginning whether or not your cash flow would allow you to do this without requiring liquidation, a lot of liquidation of your other assets and maybe take a point where your cash flow would be impaired as such that you could be hurt financially a great deal. I've noticed through the summary here that just during the past year that you have taken out several loans basically to the

extent of almost a million dollars which have been indicated to be primarily for working capital. Can you explain to me the reason that you had to do this, is it that your income from current sources is not adequate to take care of your current expenditures?

NEWTON: To my knowledge, Mr. Mauldin, I don't think that there's been anything borrowed within the last nine months to a year. I think all those most have been prior to my really becoming involved with the Aladdin. Those loans – and I really hate to get into it in too much detail in a public hearing – but those loans were scheduled around the Summa Corporation, Mr. Mauldin, in lieu of a raise, really. And with the changing of regimes, they then turned into loans that ought to be paid back, and had been paid back, for the most part, or will be by about the mid – the middle of next year.

BUNKER: Mr. Newton, would you prefer that we – at least in regards to the financial end of this – close the meeting –

NEWTON: I would appreciate it. Thank you.

BUNKER: Would those of you who are not involved in the proceedings as applicant, and are just here as visitors, would you please excuse us for a few moments while we discuss the financial aspects of the application and then we would invite you back in as soon as we've completed that.

[MEETING IN CLOSED SESSION]

SCHORR: . . . the outcome. And I will honor your wishes –

BUNKER: Well, you don't have to do that. Mr. Pike, would you address –

PIKE: Certainly.

BUNKER: – the media's position?

PIKE: Pursuant to NRS 463.120 the financial records of an applicant or the financial records of the Board are considered confidential. That's an express –

(INAUDIBLE)

PIKE: . . . come back in, the meeting now being public again, I would like to state for the record that all that was discussed while the public was excluded was the personal finances of Mr. Newton pursuant to 463.120 that is strictly confidential. In fact, there is a mandate that it not be revealed except as provided in that statute. And that – is my opinion, fell clearly within the exception to the open meeting rule.

BUNKER: Mr. Mauldin, do you want to continue your questions?

MAULDIN: Mr. Newton, you are currently working 30 weeks per year at Summa?

NEWTON: Yes, sir.

MAULDIN: Will that continue?

NEWTON: The 30 weeks will not continue. We are talking now with Summa to – and they have agreed to a system of 20 weeks a year with them and from ten to fifteen weeks a year at the Aladdin.

MAULDIN: So you're total work time in that particular category will not increase –

NEWTON: No, sir, it will not.

MAULDIN: Do you have any commitments to sell any portion of your stock to others?

NEWTON: No, sir, I do not.

MAULDIN: Well, I would be very disappointed if within a short period of time you were looking to license somebody else as part of your –

NEWTON: So would I be, sir. (Laughter) Might ruin my week.

MAULDIN: Do you know one Guido Anthony Penosi?

NEWTON: Yes, sir, I do.

MAULDIN: Would you explain your relationship to him – with him, to us?

NEWTON: This is a man that I met around the age of sixteen years old – seventeen, at the Copacabana in New York. I was appearing in the lounge. And this gentlemen used to come in. My first seeing of him was when he came in and sat in front of the stage and waved a hundred dollar bill and asked me to sing a song. And I did the song and refused the money, which astonished him. And then I ignored him the rest of the night. And the next night he came back again and sent a waiter so that he might have an audience. And he asked me why I refused the money, and my answer was that I get paid for what I do. And he was so astonished, stating that I was the first entertainer that had ever refused money from him. And from that point on he would come in various nights with groups of people and take bets on the fact

that no matter how much money he held up I wouldn't take it. During the years that I was at the Copa, which might have been two, I visited his home with his wife and my parents, and my brother. And knew his children. Years later I saw him again in Florida. Went to dinner again. In the approximately twenty one years that – from the time I met him, I might have seen this man four times. So, my relationship is just that of a fan, really.

MAULDIN: Have you ever visited him in his home?

NEWTON: In Florida and that was about 1964.

MAULDIN: Has he ever visited you in your home?

NEWTON: No, sir.

MAULDIN: Did you know that he is a purported member of the Gambino organized crime family?

NEWTON: No, sir, I did not.

MAULDIN: Are you planning to continue any relationship with Mr. Penosi?

NEWTON: Well, on the basis on which I've know him I'm – I don't think that there has been a relationship, Mr. Mauldin. And a direct answer to your question obviously is no, if he has those kind of connections.

MAULDIN: Well, I would – I would hope not. You have had a long standing relationship with Mr. Josecruz Contreras?

NEWTON: Yes, sir, about five years, six years.

MAULDIN: Will you explain that relationship to us?

NEWTON: It's an interesting one, Mr. Mauldin, because I first met Mr. Contreras when he came to my show at the Sands Hotel and brought his family. And he speaks no English and I speak no Spanish, and yet there was an immediate friendship there. I became his daughter's godfather –

[BREAK IN TAPE]

(INAUDIBLE).

NEWTON: . . . he comes. He's always a comp at the hotels that I work, and he's considered a high-roller by those establishments.

MAULDIN: Did you borrow some money from him to go into the Shenandoah Hotel deal with?

NEWTON: No, sir, I did not. On several of the occasions that I visited Mexico I also sang a song or two at his birthday party at which point in time he wanted to pay me for, and which point in time I refused. So, he talked to my business manager, and over a period of time I think gave him two checks in the event that we were going into something, we, being my business manager and myself, that we could include his daughter, my godchild, in. And if any of that money wound up in the Shenandoah, it certainly was not directly from there. And those were – later on, when I realized that there had been two checks, I insisted that those be set up as a loan and be paid back.

MAULDIN: Was any money ever refunded to you from the Shenandoah?

NEWTON: No, sir.

MAULDIN: None of this money that came from Contreras actually went in the Shenandoah?

NEWTON: No, sir, not to my knowledge.

MAULDIN: You still have the $800.000 more or less that came from him?

NEWTON: Well, I don't know – I'm sure that it was put into my account somewhere. We might have used it for other things that we've gone into, I don't know.

MAULDIN: Do you have any obligation to do anything with that money for his daughter still?

NEWTON: No, sir.

MAULDIN: And you have signed agreements to repay?

NEWTON: Yes, sir.

MAULDIN: No further questions, Mr. Chairman.

BUNKER: Mr. Newton, how did you become first interested in the purchase of the Aladdin Hotel? Did you seek them out, or did they seek you out, or – what was the –

NEWTON: I was sought out. I was sought out by a man by the name of Don Cameron, from Kentucky. And he came to see me. And asked if I would be interested in going in, initially I think for ten percent, to use my name and have me appear there and so I put him in contact with my business manager and manager. And that was the first – my first introduction.

BUNKER: What point in time in this whole situation did you really – did you personally get serious about

the purchase of the Aladdin Hotel? What were the circumstances surrounding it and who were you primarily involved with at that time?

NEWTON: Well, to the best of my recollection, because that would have been about a year ago – soon, next month being November – the Dr. Cameron thing fell through when they accepted an offer from National Kinney. They, being the stockholders of the Aladdin. Then, when that fell through, it seems that we made another offer, and I think Dr. Cameron was involved in that one also at that time, I'm not sure, it might have just been myself and Mr. Stream. And shortly after that they accepted the offer from Nigro and Carson. And then, as I stated before in the Commission meeting three months ago. Edward Doumani was contacted by Sorkis Webbe, and said that he felt – Webbe said that he felt that the Nigro/Carson deal was not going to fly, and would we come in with a backup. We, being Mr. Stream and myself. And that really is and was the beginning of what is now.

BUNKER: Your and Mr. Torres' application?

NEWTON: Yes, sir.

BUNKER: Who did you, primarily at the outset, deal with at the Aladdin Hotel?

NEWTON: Always Sorkis Webbe.

BUNKER: Always with Sorkis Webbe?

NEWTON: Yes, sir.

BUNKER: Did you have any meetings with the Board – not the Board of Directors, but with the other stockholders?

NEWTON: Only Vicky George on one or two occasions.

BUNKER: What was your purpose in meeting with Mrs. George?

NEWTON: She called and asked for a meeting. Because she felt that Mr. Webbe was not keeping her informed as to the progress of the negotiations.

BUNKER: Did you feel that Mr. Webbe was sincere in his negotiations with you as maybe contrasted to Mrs. George's interests in your purchasing the Hotel?

NEWTON: Yes, sir, I did feel that his motivations were sincere.

BUNKER: Did you at any time – did Mrs. George at any time, in any of those meetings, indicate that there was any reason why she particularly wanted you to be involved in the purchase of the Hotel?

NEWTON: Not really other than the fact that she just wanted to be kept up to date about it.

BUNKER: Did you know Mrs. George from some prior time –

NEWTON: No, sir.

BUNKER: – had you ever met her before?

NEWTON: No, sir.

BUNKER: At what point in the negotiations did Mr. Moreno become involved?

NEWTON: Mr. Moreno became involved about that same time because I didn't know Vicky George all that

well. Mark had met her as a result of having worked the Aladdin. Or having worked his artist – Lola Falana having worked there. And he felt that he might be able to be of help with her in assuring her that – that negotiations were moving as fast as they possibly could.

BUNKER: Did they not only have that association, but didn't they also have a mutual friend in Mr. Tamer?

NEWTON: Yes, sir.

BUNKER: And was there at any point in time in those negotiations with either Mr. Moreno or Mrs. George when they suggested to you that it would be appropriate or it would be necessary that you meet with Mr. Tamer?

NEWTON: No, sir, never.

BUNKER: In your experience in negotiations at any point in time, going back as far as the Dr. Cameron deal, was there ever any occasion when you met with Mr. Tamer in regards to the Aladdin Hotel?

NEWTON: Never. I wouldn't know him if he walked in this room.

BUNKER: Were there any occasions when, to your knowledge, people perhaps used your airplanes to fly to Detroit to meet with Mr. Tamer?

NEWTON: No, sir. No, sir.

BUNKER: If that was done, that would have been done, then, without your knowledge in –

NEWTON: Absolutely, but I – I know pretty much where my planes are at all times, so I know that that was not a fact.

BUNKER: And isn't it a fact that – I don't know that much about private planes – but is it a fact that it's necessary that you file a flight log or that you indicate in your log and the log is checked regularly –

NEWTON: It's a flight pattern that you file and that's in the event of an accident and also to get any kind of altitude in the – so that you just plain don't run into another airline.

BUNKER: Is it also that the log is checked periodically by the federal authorities –

NEWTON: Yes, sir.

BUNKER: – before logging your trip. And if the trip was taken, it would have been logged –

NEWTON: Absolutely.

BUNKER: Do you know of your own knowledge if Mr. Moreno ever discussed with Mr. Tamer your purchase of the Aladdin Hotel?

NEWTON: No, sir, I do not.

BUNKER: But you are aware that Mr. Tamer and Mr. Moreno are close personal friends?

NEWTON: Yes, sir, I am.

BUNKER: Does Mr. Moreno have any business or contractual position with you?

NEWTON: None at all.

BUNKER: He is not your manager –

NEWTON: No, sir.

BUNKER: He is not a representative of yours in any way, shape or form other than as you told me before a friend of many years standing –

NEWTON: I've known him since he was nine years old, yes, sir.

BUNKER: You were young people together –

NEWTON: No association whatsoever.

BUNKER: I would just suggest to you as I – as I have in the past and for the record, we are very concerned with that association. I don't suggest that there is anything awry with the association, but becoming a licensee, as Mr. Mauldin has indicated, there is going to be a tremendous amount of responsibility that goes with that –

NEWTON: Yes, sir.

BUNKER: And because of Mr. Tamer's prior association at the Hotel, and the problems that he had with regards to that federal trial, I just would caution you in the event that this – this transpires that you be very careful and that you don't get yourself compromised because of a friendship.

NEWTON: Mr. Bunker, if you remember, when I went to Detroit for the Republican Convention that I called you first to let you know that I was going. (Laughter)

BUNKER: Yes I recall that. We appreciated that very much.

[LAUGHTER]

BUNKER: And we did suggest that you go.

NEWTON: Yes, sir.

[LAUGHTER]

BUNKER: Mr. Stratton, do you have any questions of Mr. Newton?

STRATTON: Pretty well been answered, Mr. Chairman, other than the fact –

What role does Mr. Doumani have right at the moment?

NEWTON: I'm glad you asked, Mr. Stratton, because I think that – that through this whole thing, through this last year that they've – for whatever reason, there have been certain people that have been painted in a certain light, and I'm afraid Mr. Doumani is one of them. Mr. Doumani is simply a friend of mine and – and helped advise me through these negotiations, mainly because he knows Sorkis Webbe very well, they're both from the same ethnic background, and – and that's it. If I asked Mr. Doumani to come into the Aladdin with me prior to Mr. Torres, the answer would have been no.

STRATTON: Mr. Newton, of course there was some rumor, and of course you can get a rumor in the gaming business every five minutes. Did Mr. Doumani ever guarantee any loans that you –

NEWTON: No, sir, he did not.

STRATTON: Did you ever put up any collateral –

NEWTON: No, sir, he did not.

STRATTON: And, of course, Mr. Mauldin asked a question about any commitments. You have none, either oral commitments or written –

NEWTON: No, sir, I do not.

STRATTON: – with anyone?

NEWTON: No, sir.

STRATTON: How about the agreement that you and Mr. Torres had? If you wanted to sell a portion of your interest, would he have the first –

NEWTON: Yes, sir, he does and vice versa, yes, sir. It's a buy/sell agreement.

BUNKER: Mr. Newton, to your knowledge, are there any financial commitments that have been made with regards to finder's fees or anything else or assisting by anyone –

NEWTON: Absolutely not, sir.

BUNKER: – in putting this deal together?

NEWTON: No, sir.

BUNKER: None that you're aware of?

NEWTON: None that I'm aware of.

BUNKER: Just for the record, Mr. Torres, without coming forward, are you aware of any deals, finder's fees, or any money that has to pass to any attorney, or anyone else, or assisting in putting the deal together?

TORRES: Not to my knowledge, I don't know.

(INAUDIBLE)

BUNKER: Mr. Stratton?

STRATTON: I have nothing further –

BUNKER: Thank you very much.

NEWTON: Thank you, sir.

[SCENE CHANGES]

UNKNOWN: (Inaudible) Mr. Torres, not once but several times, and in comparing he always has the same answer. Either has available to him the . . .

BUNKER: . . . a rigorous three and a half months investigation during this Therm-Air application, that investigation has been updated in the past few weeks, that I would have adequate grounds to deny their application. There's an old saying that I think is particularly applicable in the case of Mr. Torres and Mr. Newton in reference to the rumors, the inuendo, the allegation, real or imagined that have been going around, and it says, what you don't see with your eye, don't invent with your mouth. And I think it's been very unfortunate for many of us involved in the Aladdin situation. People have not seen a lot of things with their eyes, but they've invented a lot of things with their mouths, and I think that's unfortunate. (Inaudible) all of us (inaudible). It appears (inaudible) seemed to have covered the areas of importance in a major hotel property, and I think that given the opportunity that you both can do an admirable job and be credits to the State of Nevada. Mr. Newton has lived here for 21 years; Mr. Torres has been here in business over 20, probably 25 years. Being members of the community also comes commitment, and we will hope that you will commit yourselves which Mr. Newton has in the past, for the

betterment of the communities that you are in. That would conclude my position. Mr. Stratton, if you have a motion . . .

STRATTON: (inaudible) Hotel and Casino, N&T Associates, Mr. Newton, Darlar Irrevocable Trust, Mr. Bell, Mr. Torres and the Valley Bank. I would move that we recommend approval and not a denial. Additionally, with regards to the trusts, I would suggest a condition that the beneficiaries of this trust must submit applications for licensure at age 21 or sooner if requested by the Board. With regards to the Valley Bank of Nevada, requests for exemptions pursuant to NRS 463.175, that that exemption be subject to –

BUNKER: . . . identified with the trust, (inaudible)

MAULDIN: Aye.

NORRIS: Mr. Stratton?

STRATTON: Aye.

NORRIS: Mr. Bunker?

BUNKER: Aye.

Is there any further business, Madam Secretary?

NORRIS: I have nothing further, Mr. Chairman.

VOICE I: Wayne –

VOICE II: Wayne –

VOICE I: – Can I get you for a few seconds?

VOICE II: When might you begin performing at the Aladdin, as far as you know now?

NEWTON: If everything goes well, we're hoping to start performing at the Aladdin around the 4th.

VOICE II: Of October?

NEWTON: Right, considering that everything goes all right tomorrow.

VOICE II: You would open it under the new ownership.

NEWTON: Yes, yes.

VOICE II: Mr. Torres is going to be general manager, who will he be answerable to? I notice the stock is split 50/50.

NEWTON: He will be answerable to the other director, which is Tom Bell, and myself.

VOICE II: As co-owner.

NEWTON: Right.

VOICE III: Did you have a lot of doubts at the end during this afternoon's and this morning's session?

NEWTON: I think that one can never be confident or over-confident in these matters because you obviously never know what direction they'll be coming from with their questions, and the most we can do is tell the truth which is what we've done.

VOICE III: What about the questions that were raised regarding Mr. Torres? Did you have any doubts about that whatsoever?

NEWTON: In terms – doubts with regard to what?

VOICE III: Regarding his relationships that the Board also had doubts about that they had expressed at the end.

NEWTON: Well, those doubts really that were expressed (inaudible) implicity by the Board, and I've known Mr. Torres since I was 15 years old and I've always known him to be the most honorable and upright and possibly the best operator in the State of Nevada.

FEMALE VOICE: Do you have any problems with the conditions the taxes or surveillance system or was it agreed to before hand?

NEWTON: It was agreed to before hand.

VOICE IV: What do you do next?

NEWTON: We go to the Commission tomorrow at 11:00, and go through all this again (Laughter).

VOICE IV: And when do you plan to start performing at the Aladdin, and have it open in force?

NEWTON: Well, hopefully, if everything goes well tomorrow, I plan to open there on the 4th of October and we hopefully will have, considering our ability to take care of all of the conditions, have the casino open the first of October.

ROSS: Mr. Newton, just a moment here, how do you feel now, after this – after this vote?

NEWTON: Well, obviously, I'm very, very pleased, and of course we now go ahead to the Commission tomorrow, and go through it all again.

ROSS: What about these questions about Guido Penosi?

NEWTON: What about them?

ROSS: Your relationship with Mr. Penosi?

NEWTON: I answered them all, and that's the absolute truth.

ROSS: Did you make a phone call last year on his behalf to the Los Angeles County police?

NEWTON: Not to my knowledge.

ROSS: You didn't?

NEWTON: Not to my knowledge.

ROSS: You made no phone calls to Clark County?

NEWTON: I don't know what this interview has to do with Mr. Penosi.

ROSS: It has to do with Mr. Penosi being in town over 48 hours, failing to register as a convicted felon.

NEWTON: Let me explain that to you – the Sheriff knew about it, it is on file and I suggest –

ROSS: He was arrested, wasn't he?

NEWTON: No, he was not.

ROSS: He got his mug shot – I think he was arrested –

NEWTON: Well, he might have been one other time when he was here, but it had nothing to do with –

ROSS: When was the last time you talked with him?

NEWTON: Oh, maybe a year ago.

ROSS: Ah huh.

NEWTON: Thank you.

ROSS: He hasn't made phone calls to you?

NEWTON: No.

ROSS: No phone calls at all?

Was he here at all on your behalf?

NEWTON: We can do it some other time, some other place –

ROSS: Right now is the time.

NEWTON: No, it is not. It might be for you, but it's not for me.

ROSS: Why is that?

NEWTON: Look, do me a favor.

ROSS: I'm not doing you any favors.

VOICE: Just no comments.

ROSS: You have no comment?

NEWTON: No, No –

ROSS: About Guido Penosi?

NEWTON: No.

VOICE: Piccolo.

ROSS: Frank Piccolo?

NEWTON: No, sir. (Inaudible)

ROSS: Ever heard of Frank Piccolo?

NEWTON: No, sir –

ROSS: Connecticut?

NEWTON: No, sir – I've heard of Connecticut, yes.

ROSS: Mark Moreno ever talk to you about Frank Piccolo?

NEWTON: They're still following me around (Inaudible).

ROSS: . . . Penosi.

NEWTON: I really don't care what you want.

ROSS: Pardon me?

NEWTON: I said I really don't care what you want.

ROSS: I'd like to talk to you about Guido Penosi –

NEWTON: Go ahead and talk.

ROSS: – and your relationship with him.

Was he ever here to provide protection or protection for your children?

VOICE: Come on, that's silly.

STATEMENT BY DEFENSE COUNSEL FLOYD ABRAMS

* * *

[Vol. 2: 200] MR. ABRAMS: May I have a moment, Your Honor?

THE COURT: Yes.

MR. ABRAMS: Your Honor, the entire panel is acceptable.

THE COURT: Very well.

Mr. Galane?

MR. GALANE: That's fine with me. The plaintiff accepts the entire panel.

THE COURT: Very well, then, I'll ask the clerk to swear the jury to try the case.

* * *

STIPULATION REGARDING WIRETAPS

* * *

[Vol. 4: 557] MR. GALANE: Plaintiff offers into evidence at this time Proposed Exhibits 329 through 356. These are, constitute a series of transcripts and tapes.

Now, we don't elect to play them, but if the defense wants anything played or anything given to the jury at this time, we will do it as part of our case.

THE COURT: Very well.

MR. GALANE: It's their option if they want anything played or anything given to the jury. In order to have it all in content, we will do it at this time and we offer it all into evidence.

MR. ABRAMS: Your Honor, we have no objection to the introduction of all the tapes and transcripts, we welcome it. I'll let Mr. Galane know after lunch if we want any more played today.

MR. GALANE: We have a stipulation that was reached before the jury came in this morning.

THE COURT: Yes, you may read it to them.

MR. GALANE: That these constitute all [Vol. 4: 558] of the wiretap tapes that the United States Government produced publicly in the trial against Guido Penosi and that the voice of Wayne Newton is not upon any of these wiretaps.

MR. ABRAMS: That is correct.

MR. GALANE: Excuse me, sir.

THE COURT: When counsel make a stipulation like that you have to accept that fact as true, in other words both sides agree that Wayne Newton's voice does not appear on the tape.

MR. GALANE: We have a further stipulation, the voice of Mark Moreno is not on any of the tapes.

MR. ABRAMS: That is correct.

THE COURT: Very well. So stipulated, and Exhibits 329 to 356 are all in evidence.

MR. GALANE: I think the record should be clear that tapes as well as the transcripts are in evidence, 329 to – well, it's actually 327 to 356.

324 to 358, Your Honor, were admitted on Thursday.

THE COURT: Very well, thank you.

* * *

EXCERPT OF JURY INSTRUCTIONS

* * *

[Vol. 33: 7022] If you find that an impression conveyed by one or more of the three broadcasts complained of was defamatory of Mr. Newton, then in order to find for plaintiff, plaintiff must also prove by clear and convincing evidence that an employee of NBC acted [Vol. 33: 7023] with knowledge of falsity or with serious doubts as to the truth of the impression conveyed, and you must also find that the impression was actually intended by a responsible NBC employee to be conveyed by the broadcast.

* * *

TESTIMONY OF AGENT LONZO SHEPARD

* * *

[Vol. 16: 3036] Q. First, was everything that was said at the meeting put into Exhibit 105, the intelligence memorandum? Or were there things said that were not memorialized?

A. It was a lengthy meeting. We didn't put everything in here.

Q. How long was the meeting, as you recall?

A. I would say at least an hour.

Q. Are the contents of Exhibit 105 accurate?

[Vol. 16: 3037] A. Yes.

Q. When was Exhibit 105 prepared?

A. September 12, 1980.

Q. Was there a point at the meeting where Agent Dorsey left the table with Mr. Halper?

A. Yes.

Q. For about how long was he gone?

A. About five minutes.

Q. Were you at the table with Brian Ross and Ira Silverman?

A. Yes.

Q. Can you recall what was said at that time, and by whom?

A. It's been so long, I just – I just don't recall.

Q. Could I show you an affidavit you signed? I don't think defense counsel has ever seen this document.

MR. ABRAMS: No, I haven't.

MR. GALANE: Do we have a copy now? Can we get one for Mr. Abrams, please, of the affidavit signed March 30, 1981. That's five and a half years ago.

Q. (By MR. GALANE) Would you look through that, and also find the section that discusses your [Vol. 16: 3038] conversation? Make any notes you want before you answer. Do you see the extent to which your sworn affidavit that you gave me five and a half years ago refreshes your recollection. Have you read it completely?

A. To the portion that you asked me a question about.

Q. Has your memory now been jogged as to that part of the meeting where Agent Dorsey was gone with Mr. Halper and you were with Brian Ross and Ira Silverman?

A. Yes.

Q. What was said, and by whom on that occasion?

A. We continued talking about the investigation of Mr. Newton, and the possible connection between Penosi and Newton. We felt that during our investigation, did not determine any financial control by Mr. Penosi, and that's the information I told to the two gentlemen. Also, that –

Q. Could you speak into the microphone?

A. Also, that the possibility was that the connection between the two that we found out was that there were death threats made against the Newton [Vol. 16: 3039] family, and that Mr. Penosi had been contacted by Mr. Newton to stop such threats.

Q. And you told that to Brian Ross and Ira Silverman?

A. Yes.

Q. Do you see the two gentlemen seated at defense counsel table?

A. Yes.

Q. Didn't you tell them that their concept of a clandestine relationship between Newton and Penosi was in left field?

A. I don't know if that's exact words.

Q. Was that approximately what you said?

A. I just told them there did not seem to be any relationship that they were looking at.

Q. You told them Mr. Ross and Mr. Silverman, they were barking up a wrong tree regarding the Penosi/Newton connection?

A. Yes.

Q. Did you tell Mr. Ross and Mr. Silverman that if they went on the air with this type of information they'd be getting themselves in trouble?

A. To an extent, yes.

Q. Did you add: That was because the gaming board agents had investigated the alleged [Vol. 16: 3040] Newton/Penosi relationship and there appeared to be nothing?

A. From the investigation we had done so far, there appeared to be nothing.

Q. Did you repeat to Mr. Brian Ross and Ira Silverman several times that four agents of the Gaming Control Board were actively working on the investigation of Wayne Newton, and were unable to find any substantiation for an alleged relationship between Penosi and Newton?

A. Yes.

Q. Did you tell Brian Ross and Ira Silverman that Penosi was merely Wayne Newton's fan who might have helped Newton stop some threatening phone calls to his life and to his wife and child's lives?

A. That was part of the conversation we had.

Q. Did you tell, at that point did Agent Dorsey come back with Mr. Halper?

A. Yes.

* * *

TESTIMONY OF AGENT LONZO SHEPARD

* * *

[Vol. 16: 3044] Q. Do you remember what Brian Ross told you about Piccolo bragging concerning Wayne Newton?

A. I don't recall the specifics.

Q. Can I show you page four, lines eight to ten. State whether that jogs your memory. If so, tell the jury what Brian Ross said in that regard.

A. That Wayne Newton was in Piccolo's back pocket because of his connections with Mark Moreno.

Q. Do you remember Brian Ross and Ira Silverman talking about Newton kicking funds back to Frank Piccolo?

A. Again, Mr. Galane, it's been so long I don't recall.

Q. Would you look at page four, lines 11 to 12 in that regard and if it jogs your memory, tell the jury what Brian Ross and Ira Silverman both said in that regard.

A. Said that they had sources that stated that Mr. Newton's kicking funds back to Piccolo.

Q. Did you ask them how the money was being kicked back to Piccolo?

A. Yes.

Q. Do you recall what Brian Ross and Ira Silverman said in response to your question?

[Vol. 16: 3045] A. I don't recall.

Q. I show you, sir, page four, lines 14 to 15. If that jogs your memory, state what you recall that they said in that regard.

A. From here it states that it was checks from operations in California.

Q. When you say it states, you mean they stated, Brian Ross and Ira Silverman stated that. Is that what you're saying?

A. Yes.

Q. Do you recall telling both Brian Ross and Ira Silverman the number of man-hours you and another agent had spent going through Mr. Newton's books in California?

A. I don't recall it, but after I read my statement –

Q. Would you read page four, lines 15 to 20. If it jogs your memory, state what you recall in that regard that Brian Ross and Ira Silverman were told by you.

A. That I stated another financial agent and I spent nearly a hundred man-hours going through Mr. Newton's financial records and found nothing indicating any monies being diverted to anybody except for normal bills being paid.

[Vol. 16: 3046] Q. Do you recall what you then added to Brian Ross and Ira Silverman concerning what would happen if they put that on television?

A. I'm sorry, I didn't recall until I read it.

Q. Look at page four lines 19 and 20. If it jogs your memory state what you recall.

A. I still don't recall the statement. But it's there.

Q. Do you recall the essence of what you told them?

A. Basically that I felt there would be some kind of problems if they did indicate this on the news that monies were diverted. I think as it turned out, that wasn't ever put in the report.

Q. Did Brian Ross and Ira Silverman indicate when the television broadcast would be put on NBC Nightly News?

A. I believe they told Joe and I that it would be following within two or three weeks.

* * *

TESTIMONY OF AGENT LONZO SHEPARD

* * *

[Vol. 16: 3048] Q. (By MR. GALANE) Do you recall the circumstances under which this document was prepared, Mr. Shepard?

A. Yes, I do.

Q. Would you state how it was prepared?

[Vol. 16: 3049] A. It was prepared – when was this done? About six months after the investigation was completed, in your office.

Q. What are the circumstances of how the document came about?

A. How this document came about?

Q. Right. Do you recall that? Do you recall your preparing it with your own words?

A. I dictated it to your secretary.

Q. And she did what?

A. Typed it up, and I signed -- reviewed it and signed it.

Q. These were all your words?

A. Yes. But remember, it was five and a half years ago.

Q. Having read it again, does it jog your memory concerning what Mr. Ross and Mr. Silverman told you about what they were asking you to do? I'm talking about the television –

A. I understand. Mr. Galane, I'm sorry, I really can't remember.

* * *

TESTIMONY OF JOHNNY CARSON

* * *

[Vol. 16: 3173] Q. (By MR. GALANE) What is your best [Vol. 16: 3174] recollection what either of these two gentlemen Mr. Ross and Mr. Ira Silverman related to you at that meeting and using if you can Mr. Carson, I know it

is hard, it has been awhile, the best you can recall their exact words were if you can recall it.

A. There is no way I can quote exact words from almost two years ago.

Q. Do your best.

A. Nor can I tell you what Mr. Ross said and what Mr. Ira Silverman said specifically.

Q. Okay?

A. The conversation was that they and NBC News were doing a segment about the Aladdin Hotel, specifically on Wayne Newton and his involvement in the purchase of the Aladdin Hotel. Now, I guess they were telling us out of interest because we had been involved in trying to purchase the Aladdin Hotel, Mr. Nigro and I.

The general conversation simply ran to the effect that they were going to do a segment allegedly to show that Wayne Newton was involved with some people in the purchase of the hotel. I don't remember all the names of the people that they mentioned.

And generally that's what, that's what [Vol. 16: 3175] it was about. The goings on behind the purchase of the Aladdin Hotel as concerned Mr. Newton.

Q. Do you recall anything more specifically?

A. Specifically they said something about that they had recorded telephone conversations between Mr. Newton and some other parties, the names I cannot recall. I don't want to speculate on exactly what was said because I don't recall, but that was the general tenor of the conversation.

Q. Did they indicate to you in any way whether or not they had any film that they had taken in connection with the story?

A. Again I would have to speculate. I don't recall it specifically.

Q. Is there anything else that you recall these gentlemen saying to you?

A. The name Penosi was brought up. I did not know the gentleman, had never heard of the name. They had mentioned something to the effect that they had some telephone conversations or something, and this was simply going to be a segment they were going to put on dealing as they said with organized crime in the United States.

Q. Is there anything else that you can [Vol. 16: 3176] recall?

A. Not specifically.

Q. Do you recall which of the two gentlemen were speaking and relating this to you or were they both?

A. No, I can't.

Q. You remembered the name Penosi. What did they indicate to you?

A. They didn't indicate anything to me. I didn't know the name or know the gentleman.

Q. It was just mentioned in the course of their conversation?

A. That is correct.

Q. Did they ask you any questions, sir?

A. They may have asked questions if I knew anything about what was going on and I said, no.

Q. Did Mr. Bushkin make any statements during the meeting to you, Mr. Ross, Mr. Ira Silverman?

A. Any statements?

Q. Yes. Did he speak?

A. He may have. I don't recall specifically.

Q. Do you recall what he may have said if you recall?

[Vol. 16: 3177] A. I don't think he said much more than I did. We had no knowledge of anything.

Q. Would it be correct, and please clarify it if I am wrong, that these gentlemen related to you what they were working on and asked you whether or not you had any information concerning it?

A. I don't recall whether they asked me if I had any information. I was under the impression they were simply relating what they were doing because we had been involved in the attempt to purchase the Aladdin Hotel. And they were simply doing it as we might be interested. Whether they asked any questions, I do not recall.

Q. As a courtesy to you?

A. I have no idea.

Q. Do you recall at the present time did you make any statements to them?

A. We probably had a conversation. I don't recalling specific statements.

Q. Have you, Mr. Carson, exhausted your present recollection as to what was said to you and Mr. Bushkin during this meeting and what you might have said to them?

A. All I can say again at the expense of being redundant, it was a general conversation on [Vol. 16: 3178] something that NBC News was pursuing as a segment of their news involving the Aladdin Hotel, Wayne Newton and the specific names the only one specific name that I recall was Penosi. There was a general discussion about the Aladdin situation. By that time I think we were out of it. We were no longer involved with it. I had nothing to add to their conversation. I simply had no knowledge of anything.

Q. How long would you estimate that this meeting took from the time they arrived at your home until they left?

A. Possibly an hour.

Q. Do you recall whether or not you talked about any other subjects other than Wayne Newton and the Aladdin Hotel, if you recall?

A. I can't recall specifically.

Q. During this meeting did Mr. Ross or Mr. Ira Silverman relate to you the sources of their information?

A. I don't believe so. I don't recall if they did.

Q. Did they indicate if you recall whether or not they considered their sources to be reliable or quality sources?

A. I have no idea.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 24: 5002] Q. Did you take an airplane trip that very same afternoon from Reno airport, leave at 6:10 p.m. and arrive at Burbank an hour later?

A. Yes.

Q. You checked into the Westwood Marquee Hotel; is that correct?

A. I think that's correct.

Q. Did you work that night on the script?

A. Yes, we did.

Q. We meaning you and Ira Silverman worked the night of Thursday, September 25, 1980 on the script?

A. Yes, we did.

Q. Did you know before then that you were scheduled to meet at Mr. Carson's home with Mr. Carson the very next day?

A. Yes, we did.

Q. Did you and Ira Silverman again work on the script on the morning of Friday, September 26, 1980 before you went to Bushkin's office?

A. I can't recall. I might have. I think we did most of the work that night, though.

[Vol 24: 5003] Q. So you had a draft of the script finished on the night of Thursday, September 25, 1980?

A. If I recall correctly I think we did.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 25: 5226] Q. Mr. Ross, I want to read to you now from a memorandum which has been introduced in evidence here as Plaintiff's Exhibit 105. It's a memorandum of Agents Shepard and Dorsey; subject, Wayne Newton, dated September 12, 1980.

Were you in Court when that was read into the record?

A. Yes, sir.

[Vol. 25: 5227] Q. All right. I'd like to read this to you and ask for your comments, responses, observations: Quote, On September 5, 1980, agent Shepard arranged a meeting with an IRS confidential source regarding the Aladdin investigation. The source is an investigative reporter for a major television network. The source was

to supply information linking Wayne Newton to known OC figures, unquote.

What do you have to say about that?

A. Well, I'm not a confidential source for the IRS. I don't know how that came to be I was described that way. And it wasn't that we had information. We were actually looking for information. We were trying to confirm what little we had at that point.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 25: 5231] Q. Agent Dorsey then asked the sources what kind of information they had. The sources stated that Piccolo at an unknown time and date had [Vol. 25: 5232] met Newton in Florida. They could not give a location in Florida or what the meeting was about. It should be noted that during Newton's interview by Board agents he disclaimed any knowledge of Frank Piccolo.

A. We had been told by one of our sources that they felt there had been a meeting between Mr. Piccolo and Mr. Newton in Florida. That was not the case, and we were asking them if they knew anything about it since they had talked to Mr. Newton.

We had heard it. We thought it might be true, but we checked it out and it wasn't the case and we never said it in our broadcast.

Q. Quote, the sources state Penosi is Piccolo's cousin. The sources then stated that Penosi had called Newton several times between February and May of 1980 and that Newton had called Penosi. The sources realized that – I'm sorry. Why don't I stop there.

Is that true?

A. That is true, we heard there were extensive phone conversations back and forth between Mr. Newton and Mr. Penosi somewhere in that time period beginning maybe even earlier than that.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 25: 5288] Q. All right. Would you turn first, please, to Exhibit 256, and tell us what that is?

A. This is a portion of what was the first draft of the script that Ira Silverman and I prepared.

Q. And is that a portion that we have heard an audio played of in this courtroom?

A. That was the one that was played, yes.

Q. Now, can you read it to us, please?

A. Investigators say despite his big income Newton has had serious financial problems, and that last year just before he announced he would buy the Aladdin Guido Penosi got involved in Newton's affairs, and sent word to

mobsters on the east coast to help take care of Newton's money problems.

Investigators say in one two-month period there were more than a dozen phone calls back and forth between Penosi's house and Newton's house, and that at the same time police in New York City learned that a high-ranking member of the Gambino Mafia family, Frank Piccolo, was telling associates he had taken care of Wayne Newton's money problems and had become a hidden partner in the Aladdin Hotel [Vol. 25: 5289] deal.

Q. Now, what is the relationship, Mr. Ross, between Exhibit 256 and the words that appear on the script of 255?

A. The section corresponds with the middle paragraph on page two. And this, what you're saying, is sort of the evolution of the first draft to the final product. This would be the beginning and the script would be the end.

Q. What changes were made and why from Exhibit 256?

A. I guess if you look at 256 it's easiest to see. In the first case the word – this was a conversation Ira and I had with Gil Millstein, who is the copy editor.

Q. Why don't you tell us first what Mr. Millstein's job is at NBC News.

A. I'm not sure of his title, but he essentially, he – all scripts sent in by reporters from all over the world go by him. And he edits them and clears them. And he has a very sharp pencil and he's – his job is to sign off on the scripts before they're actually seen by the executive producer.

Q. All right. Can you tell us looking at Exhibit 256 what comments, if any, Mr. Millstein had [Vol. 25: 5290] and what you did?

A. His first comment came on the second line where it said, "Newton has had serious financial problems". And Gil Millstein said to us, What do you mean by serious financial problems? What are we talking about here?

And we told him we don't really know exactly. It has to do with some sort of magazine or newspaper deal, and it's $20,000 or $100,000, we're not clear on the amount that was in dispute here.

He said, Well, for a guy like Wayne Newton you really couldn't call that serious. Take out the word "serious". So we took out the word "serious".

And then the script goes on to say, "Last year just before he announced he would buy the Aladdin Hotel", and at this point Gil said, Guido Penosi got involved in Newton's affairs, what are you talking about? That's not fair. What does that mean? Tell me what that means.

And I said, Well, all we really know, Gil, is that Newton did call Penosi for help with some kind of a problem, something to that effect.

And he said, Then just say that. Don't say he got involved. Just say what you mean, make it [Vol. 25: 5291] very clear. So we put that in. And we dropped the next line.

And, instead, Gil said, now what we've got to say is that it went to Piccolo in New York. Let's be specific here. And because we don't know what the problem is, he said

we should say investigators say whatever the problem was, which he told us, and I agreed with him, Ira did. That indicates to the viewer, the listener we don't really know what the problem is, but whatever it was it was important enough for Penosi to take it up with leaders of the Gambino family in New York.

Q. Let me have you pause for a minute. What do you mean when you say you didn't know what the problem was? What didn't you know?

A. We didn't know enough to categorize it. We knew it involved money. We knew it involved a dispute with people that were – people Mr. Newton got involved with that somehow had ties to the Genovese organized crime family, and when he went to get help he went to some people who were in the Gambino organized crime family and somehow at a higher level members of these two crime families had to resolve the dispute. That's all we knew.

We had heard at some point, and I don't [Vol. 25: 5292] recall the source, that the money involved was $100,000 or $20,000. But on those details we were very unclear. And we didn't quite know how to categorize it.

Q. Why don't you go on with what Mr. Millstein said and what you did.

A. That is sort of the end of what Mr. Millstein – those were his key comments there. But he was the one who said we should knock out got involved with the affairs and say what we knew hard, and that was that Newton did call Penosi. He was the one who said you can't say serious because 20,000 or $100,000 isn't that

serious when you're talking about someone like Wayne Newton. And he was the one who said since we don't know what the problem is, let's just say whatever the problem is.

We were all sort of grasping for a word to characterize it. And we just decided we didn't really know enough, that we would say we didn't know enough, so we would say whatever the problem was.

Q. Did you know enough to know that there was a problem?

A. We knew there was a problem. We knew it involved a dispute over money. And we did not know exactly what the magazine or the newspaper deal [Vol. 25: 5293] was, and we didn't really know the role of Piccolo and Penosi in solving the problem. All of that is clear as we've heard on the [wiretap] tapes here, but at that time we didn't have the advantage of the [wiretap] tapes or the testimony or any of that.

Q. You had not heard the [wiretap] tapes –

A. No.

Q. – at the time you prepared the broadcast?

A. No, no.

Q. I notice that on Exhibit 256, the third line from the bottom, it says, "He had taken care of Wayne Newton's money problems," and the word "money" was later dropped; is that right?

A. Again, that was because Gil felt, again, it was not the best way to categorize it, as a money problem. And by

saying whatever the problem, we were just intentionally being -- saying we didn't know what it was.

* * *

TESTIMONY BY BRIAN ROSS

* * *

[Vol. 26: 5417] Q. (By MR. GALANE) Let me get your confirmation that this is what you swore to yesterday about your conversation with Mr. Millstein?

A. Right.

Q. His first comment came on the second line where it said, Newton has had serious financial [Vol. 26: 5418] problems, and Gil Millstein said to us, What do you mean by serious financial problems? What are we talking about here? And we told him we don't really know exactly. It has to do with some sort of magazine or newspaper deal and it's a 20,000 or $100,000, we are not clear on the amount that was in dispute here.

He said, well, for a guy like Wayne Newton you really couldn't call that serious, take out the word serious.

So we took out the word serious and then the script goes on to say, last year just before he announced he would buy the Aladdin Hotel, and at this point Gil said, Guido Penosi got involved in Newton's affairs, what are you talking about? That's not fair. What does that mean? Tell me what that means.

And I said, Well, all we really know, Gil, is that Newton did call Penosi for help with some kind of a problem, something to that effect.

And he said, then just say that. Don't say he got involved, just say what you mean. Make it very clear.

So we put that in. We dropped the next line and instead Gil said, Now, what we've got to say [Vol. 26: 5419] is that it went to Piccolo in New York. Let's be specific here because we don't know what the problem is. He said we should say, investigators say whatever the problem was which he told us and I agreed with him. Ira did. That indicates to the viewer, the listener we don't really know what the problem is, but whatever it was it was important enough for Penosi to take it up with leaders of the Gambino family in New York.

Is that what you swore to yesterday?

A. That is correct.

Q. Can you remember what you swore to five years ago?

A. Yes, I do.

Q. You do.

Would you start July 2, 1981, line 113 – excuse me, page 113, line 16 and read if you would to page 114, line 20. Just confirm that was your sworn testimony on July 2nd, 1981.

A. Yes.

Q. Would you explain the sequence of work that you and Ira Silverman carried out with regard to this

material relating to the October 6, 1980 broadcast? When I say sequence, I mean videotape work as compared with the preparation of the script?

[Vol. 26: 5420] A. The first thing we did was to prepare the script and sent it to New York to Wellborn, Wolzien, to whoever else he took it to. We got the script back and whatever changes there were, I can't recall what changes there were if any, we felt we had an okay from the point of Millstein from the copy desk and from Wellborn with a legal point of view and then with that we began to prepare the videotape.

In that case the first thing that would be done and I did, I recorded the narration, the part that I did, that was recorded, then we match up pictures to the length of whatever time it takes to say those words.

Upon completion of a first cut I think we looked at it and then after that production process I believe it was sent to New York.

Q. Let me reconfirm what you said in part was, quote, whatever changes there were, I can't recall what changes there were if any.

A. That is right.

Q. Did you read one word in there about that detailed discussion with Mr. Millstein concerning deletion of serious, inclusion of whatever it is that NBC's lawyer was asking you about yesterday? There isn't a word of that in there?

[Vol. 26: 5421] A. No, can I explain?

Q. I'll go to the next question, if I may.

MR. ABRAMS: Your Honor, I think he should have a right to explain.

MR. GALANE: Not on my cross-examination unless there is a court order. I have a right to impeach the witness my way. The jury has heard what he swore to five years ago.

MR. ABRAMS: All right. I'll ask him later, Your Honor.

THE COURT: That's the proper way to handle it.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 26: 5456] Q. Did you tell the jury yesterday that when Gil Millstein brought to your attention the words, quote, last year just before he announced he would buy the Aladdin Hotel, unquote, Mr. Millstein said at this point Guido Penosi got involved in Newton's affairs, what are you talking about, that's not fair, what does that mean, tell me what that means, and you Brian Ross said to Mr. Millstein, well, all we really know, Gil, is that Newton did call Penosi for help with some kind of a problem, something to that effect.

A. That's my testimony.

Q. Did you hear the testimony of Ira Silverman in this courtroom when I read to him from his deposition

that it was in 1980 that he talked to source B about the problem that led Mr. Newton to call Guido Penosi?

A. When in 1980?

Q. Did you hear the deposition testimony read to this jury when Ira Silverman was on the witness stand that it was in the year 1980 that Ira [Vol. 26: 5457] Silverman and source B discussed Mr. Newton having made the call to Penosi because of the problem? Did you hear that, sir?

A. I don't recall it specifically, but I have been here every day so I'm certain I heard it if he said it.

Q. Did you talk to some source that pushed it back to last year, pushed the phone call back to the previous year?

A. We were unclear about that.

Q. My question is, did you Brian Ross talk to a source, you, sir?

A. Yes.

Q. Who said that Wayne Newton called Penosi in the previous year, in 1979?

A. I had talked to Mr. Newton and he had said that he talked to Mr. Penosi maybe sometime last year. That was part of the mix that we had when we were trying to determine whether to say when the calls took place, and we weren't sure and we took what we thought was the most cautious approach because we weren't sure.

Q. That was your only source, then, is the timing of the call, Wayne Newton?

A. Well, did I –

[Vol. 26: 5458] Q. Timing, sir?

A. Who I talked to?

Q. Who you talked to?

A. That is right.

Q. Wayne Newton?

A. In terms of last year, yes.

Q. No other source?

A. That's right.

Q. Did Newton tell you when last year he called Guido Penosi?

A. No, he didn't.

Q. Did Newton tell you when he announced his interest to buy the Aladdin Hotel?

A. No, he didn't.

Q. Did Newton tell you just before he announced his interest to buy the Aladdin Hotel he called Guido Penosi for help with a problem?

A. Mr. Newton didn't say that.

Q. In fact, did Wayne Newton even mention he called for help when he mentioned that last year call?

A. No, he did not.

Q. Did he even say it was a phone call?

A. No, he did not. He said the last time I talked to him was – or I asked him when was the last [Vol. 26:

5459] time you talked to him, and I think he said maybe last year, maybe a year ago, I'm not sure what he said.

Q. Now, since Gil Millstein read to you the words just before, I take it you were the originator of the script language, investigators say just before he announced his interest in, Newton announced his interest in buying the Aladdin Hotel Newton called Guido Penosi for help with a problem.

A. Along with Ira, yes, we were.

Q. Did you ever hear a wiretap of that phone call?

A. No.

Q. Did you ever have information that there existed a wiretap of that phone call?

A. No, I did not. It was not known to us at that time whether there was –

Q. Are you implying there ever was a wiretap of that phone call, sir?

A. There never was as far as I know a wiretap.

Q. To this day so far as you know, right?

A. That is correct.

Q. You are not implying anything else?

A. Not at all.

* * *

TESTIMONY OF BRIAN ROSS

* * *

[Vol. 27: 5524] Q. Mr. Ross, did you during examination by NBC counsel testify that as part of the basis for the statement "despite his big income, authorities say Newton has had financial problems," you took into consideration that you said Lon Shepard told you, to wit, that Mr. Newton had been put on an allowance, [Vol. 29: 5525] that Mr. Newton's financial affairs were chaotic, that he was spending all sorts of money, that Newton spent his money in a childish way, do you recall that testimony?

A. Yes, sir, I do.

Q. Can you recall what you said five years ago regarding the amount of weight you gave to Mr. Newton's personal problems insofar as this broadcast was concerned?

A. I don't quite follow the question.

Q. Let me show you your sworn testimony on July 2, 1981, page 225, starting on the line nine, to page 226, line 12. Would you confirm that that was what you swore to five years ago, as far as Mr. Newton's personal finances are concerned.

MR. ABRAMS: I'm sorry, Mr. Galane, could I have the page again?

MR. GALANE: 225, line nine, to page 226, line 12.

THE WITNESS: Yes, that's my testimony.

Q. (By MR. GALANE) May I read with you.

A. Yes.

Q. Question – I'm now asking a series of questions and asking you to read what your answers were on July 2, 1981, at your deposition under oath.

[Vol 27: 5526] Question: What parts did you leave unverified?

A. Well, we felt the part about – well, we felt the parts about how he spent his money personally were not important; that's his business; that the dealings with the Mexican individual that was said to have ties to organized crime was something we would have a very difficult time confirming or working up, and we left that out of our story.

Our main interest was in the supposed dispute he had over this magazine or publication that we had been told was the source of a fight, threats, that somehow got him involved with organized crime figures, Piccolo and Penosi.

I think in those areas, we were able to take steps to understand that that was, in fact, a serious problem and it did exist.

Q. My next question to you five-year ago was: What did you find out regarding that matter that you did attempt to verify?

A. That the problem did exist.

Q. And my next question five years ago was: What problem?

A. That he had a problem with someone who [Vol. 27: 5527] claimed he owed money. He claimed he didn't.

Q. And my next question five years ago was: According to what you claim you found out, who claimed that Wayne Newton owed money?

A. Mark Moreno claimed it.

Q. And my next question five years ago was: How much money was involved?

A. I was told it was $20,000 or so, approximately.

* * *

TESTIMONY OF J. MARSHALL WELLBORN

* * *

[Vol. 11: 2050] Q. In this deposition today on May 4, 1982, [Vol. 11: 2051] have you had an opportunity to exhaust your present recollection concerning what was said in the course of the telephone conversation participated in by Messrs. Ross, Silverman, Wolzien and yourself that you say took place on the same day you were given the first draft of the script?

A. No.

Q. Would you take the opportunity now to attempt to exhaust your present recollection with regard to what was said in that telephone conversation, and take all the time you need, Mr. Wellborn.

Mr. Hyde, counsel for defendant, asked: Do you want to take a break?

Mr. Galane said: No. If there is a break, I will have to create a record with the judge that in the middle of a question that Mr. Wellborn took an opportunity to confer with counsel.

Then there's other colloquy, which I'll read if defense wants me to read it.

MR. GALANE: I would ask you to read it.

MR. RIDDLE: I would like to have an answer, and take all the time you need. If you walk out of here, do so to my objections. Since Mr. Wellborn is an officer of National Broadcasting [Vol. 11: 2052] Company, Inc. I believe my remedies are clear.

MR. HYDE: I'm going to make a telephone call while Mr. Wellborn is thinking.

THE WITNESS: The record will show that I've stayed in the room.

MR. VERNON: The record shows that.

THE WITNESS: I will now think. I'll have a cup of coffee while I think.

MR. GALANE: I'm instructing you that everything is on the record.

THE WITNESS: Put it down. Okay, are you ready?

Question By MR. GALANE: Have you now exhausted your present recollection regarding this first telephone conversation among you, Mr. Ross, Mr. Silverman and Mr. Wolzien on the day you received the first draft of this script relating to Wayne Newton?

A. The answer is no. Now, I would like to try a more expansive answer to the question, but I want you to understand that I have not completely exhausted my recollection, or all the possibilities of my recollection. I'm trying to do my ultimate once again to tell you everything I remember about the conversation.

We went line by line through the script [Vol. 11: 2053] that was in front of me, and by asking them what the support was for each of the lines I became acquainted with the reason they had for believing the statements that they have written, and for choosing to write it in the way it had been written. The process took some time – 20 or 30 minutes – which is typical of this kind of review.

With respect to the – what we will call the Wayne Newton part of the story, I learned from Brian and Ira, the way I recall it, that they were very lucky as journalism goes, in being present in a hearing room in Reno, Nevada, with a camera running when Wayne Newton gave testimony which they found remarkable in light of the information they already had about Mr. Newton.

Namely, they had the rare, good fortune for a journalist of getting his testimony under oath in which he flatly and categorically denied having any relationship with Guido Penosi. There was a certain amount of glee and pleasure derived from that because normally when a news event occurs, the cameras aren't there, and this time the camera was present. And they and we were all pleased with that.

* * *

TESTIMONY OF IRA SILVERMAN

* * *

[Vol. 21: 4410] Q. Mr. Silverman, did you and Brian Ross pool all the information and firsthand knowledge both of you obtained which formed the basis for the script for the report which became part of the NBC Nightly News aired by the NBC network on October 6, 1980 under the title Wayne Newton And The Law?

A. Yes, we did.

Q. Prior to the October 6, 1980 NBC broadcast entitled Wayne Newton And The Law, did you have any information supportive of the possibility [Vol. 21: 4411] that Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino was not financed totally through a loan to him personally from Valley Bank of Nevada?

A. No. We had heard questions about it, but we had no information.

Q. Your answer is no to my question?

A. No.

MR. ABRAMS: Object. The witness has answered the question.

THE COURT: Yes. He answered no, counsel.

Q. (By MR. GALANE) Prior to the October 6, 1980 broadcast on NBC entitled Wayne Newton And The Law, did you have occasion to participate in or hear any discussion of the possibility that Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino was

not financed totally through a loan to him personally from Valley Bank of Nevada?

A. I'm sorry. I didn't follow that question. Could I have it back.

* * *

[Vol. 21: 4412] MR. GALANE: May I stand next to you, if I may, and ask you to focus upon page 1927, lines four to 12, and merely tell me, was that your answer to that question on that occasion?

A. The question in the deposition is as stated, and my answer was: Not that I recall.

Q. Let me read – may I read the –

THE COURT: Yes.

MR. GALANE: To the jury the exact question and answer on July 29, 1982.

[Vol. 21: 4413] The question was: Prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton, did you have occasion to participate in or hear any discussion of the possibility that Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino was not financed totally through a loan to him personally – should be from Valley Bank of Nevada?

And the answer given at that time was: Not that I recall.

Q. (By MR. GALANE) Mr. Silverman, could you hold this book when I go back to the lecturn, in case you feel it helps refresh your recollection.

Let me ask you this, sir. Prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton, did you have reason to believe that Wayne Newton's acquisition of his interest in the Aladdin Hotel and Casino was not financed totally through a loan personally to him from the Valley Bank of Nevada?

A. No, and the answer here is no.

Q. I'm going to ask you a question that appears on page 1931, if you wish to turn to it. My question starts at line 14.

Did you have reason to believe, prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton, that the Nevada gaming authorities had [Vol. 21: 4414] not investigated fully Mr. Newton's relationship with Guido Penosi?

And was your – well, what is your answer?

A. The answer here is I don't remember.

Q. Is that your answer?

A. Well –

Q. At that time you didn't remember.

A. At that time I didn't remember, yes.

Q. I'm going to read my question on line 23 to you, sir, if I may.

A. Same page?

Q. Same page. If you would follow with me.

Did you have any information prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton that

the Nevada gaming authorities had not investigated fully Mr. Newton's relationship with Guido Penosi?

And your answer was: Not particularly?

A. In this deposition, yes.

Q. I'll go to the next question. Were you asked the question: Did you have any information prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton that there was a possibility that the Nevada gaming authorities had not investigated fully Mr. Newton's relationship with [Vol. 21: 4415] Guido Penosi, and was this your answer at that time: Not particularly. I think in fairness "fully", you know, is a word that is kicking around in my head because I don't know how you achieve fully. How anybody could investigate fully. It is a difficult point to reach where you are satisfied that you did an investigation of that kind fully?

A. Correct.

THE COURT: Is that your same answer today as the one you gave then?

THE WITNESS: Let me read it, if I may have a moment, judge.

I think, Judge, that my answer today would be different, having had a chance – this deposition was taken at a time when Brian Ross and I were working at our jobs and could not focus as carefully as we can now here in this trial.

Q. Before you go further, sir, were you given an opportunity to read and study this deposition –

A. Yes.

Q. – and make changes in it?

A. Yes.

Q. And this opportunity was given to you how much later?

[Vol. 21: 4416] A. I don't recall exactly. Sometime later, yes.

Q. And you went over these changes with your lawyer before you signed the document?

A. To the best of my ability as a – under the pressures of working as a newsman. There are thousands of pages, you know, Mr. Galane, of this.

Q. Let's check the date when you signed it. You don't from memory know how much time elapsed between when you gave the testimony and ultimately swore to the same thing, do you?

A. No, I don't.

Q. All right. We'll try to find that and get that to you in a few moments, if we may.

Q. Now, when you recall in that answer –

A. Which answer?

Q. The answer I just read. Not particularly – I'll read it as the basis for the next question. The answer is: Not particularly. I think in fairness "fully", you know, is a word that is kicking around in my head because I don't know how you achieve fully. How anybody could investigate fully. It is a difficult point to reach where you are satisfied that you did an investigation of that kind fully.

[Vol. 21: 4417] And was my next question to you: Where who would be satisfied?

And did you answer at that time: The investigator?

A. Yes.

Q. And turn to line 24. Did I at that time –

A. Same page? Which page, Mr. Galane?

Q. Same page. Line 24, sir. Do you have it in front of you?

A. Yes.

Q. Did I at that time ask you: Who was conducting the investigation of Mr. Newton's relationship with Guido Penosi prior to the October 6, 1980 broadcast concerning Wayne Newton?

And was your answer: I imagine Mr. Dorsey, Mr. Shepard, possibly other members of the investigative staff or whatever staff they have for the Nevada gaming authorities?

A. Correct.

Q. Please turn to line 17 on the same page. Did I ask you at that time as follows: Did you have information prior to the October 6, 1980 broadcast on NBC concerning Wayne Newton of the possibility that the investigators for the Nevada gaming authorities [Vol. 21: 4418] had not investigated to their satisfaction Mr. Newton's relationship with Guido Penosi?

And did you answer: Not particularly?

A. Correct.

* * *

TESTIMONY BY IRA SILVERMAN

* * *

[Vol. 23: 4701] MR. GALANE: The date, Mr. Abrams, is June 3, 1982.

Q. (By MR. GALANE) Now, I would respectfully ask you, Mr. Silverman, to start at page 1164, with my question, which is line ten, and go to 1167, which is the end of that answer.

A. Line eight?

Q. Line eight. And after you've read it, merely confirm, if you would, whether that was your sworn testimony five years ago.

A. I've read it, and I believe that's my deposition at the time.

Q. That's you sworn testimony at that time?

A. Sworn testimony.

Q. Question: You are now answering a question as to what you generally remember source B said to you?

Answer: No. What was generally discussed, whether I said it or source B said it, what was the general gist of it.

These are the kinds of things that I generally remember came about after, you know, in conversation or later conversations, after I recounted some of the testimony that I could recall Mr. Newton [Vol. 23: 4702] giving in Carson City before the Nevada Gaming Board.

And in general, my sense of what source B was saying was that there was a – that it was incorrect for Mr. Newton to deny a relationship, you know, a relationship that was social, business, a relationship where articles of value had been exchanged over the years.

So I think there was discussion of why Mr. Newton was constrained to answer questions under oath as to his relationship with Penosi as he did. And I think there was general discussion of how individuals, some of whom had extensive criminal records, individuals like Mr. Penosi, Mr. Weinberg, Mr. Campion, and others, how these individuals had access to a man who was as well insulated as Mr. Newton was and is and who has retained personal bodyguards and other employees who generally shield him from the general public and certainly from unsavory elements of the general public.

But here, over a period of time, it appeared very interesting that a number of people with criminal backgrounds had access and repeated access to Mr. Newton in areas that were not public areas. Here were people who were able to come to his home, were able to visit with him backstage, that [Vol. 23: 4703] kind of thing.

I think there were also discussions that at a time when there were indications that Mr. Newton genuinely felt threatened for himself, his own personal safety and the safety of his family, that the individual he reaches out

to for help is a relationship – is a person who at the same time he says is an individual who he says he has no real relationship with.

And in his memorandum represented to the court, or in press accounts, which we were also able to discuss, Mr. Newton indicated that he had gone to Mr. Penosi when he was threatened because of Mr. Penosi, he knew that Mr. Penosi had served time in prison, and we discussed that this seemed to be a strange credential for a man's ability to help out in this kind of a situation.

We discussed how Mr. Newton may have known that Mr. Penosi had served time in prison, and we discussed what Mr. Newton may have opened himself up to. We discussed what Mr. Newton may have opened himself up to in going to Mr. Penosi in a situation which at that point involved threats of violence.

What if these threats of violence were met with other threats of violence, would Mr. Newton [Vol. 23: 4704] then be part of a street crime situation, would he be a – was he opening himself up to being a part of a criminal, criminal conspiracy.

And that was the nature of the discussion of what was set in motion by Mr. Newton going to Mr. Penosi with a problem that involved threats of violence. That's what I can remember of the general nature of the telephone conversation.

Did I then ask how long before the October 6, 1980 broadcast that conversation with source B took place? Read starting the next line, through your answer, if you would, and confirm if that was your testimony.

A. Yes.

Q. Question: How long before the October 6, 1980 broadcast of the segment entitled Wayne Newton And The Law did the conversation take place that you described in your last answer?

Answer: I don't recall. But it certainly would have to be that conversation, and I think it was followed by other conversations of the same nature, but that conversation certainly had to be between the time of the hearing in Carson City, and the broadcast.

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TESTIMONY OF IRA SILVERMAN

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[Vol. 23: 4717] Q. Did you, Mr. Silverman, the other day, when His Honor asked you in this courtroom whether you are changing a particular item of testimony from what it had been in your deposition five years ago, did you answer His Honor as follows: Quote, I think, Judge, that my answer today would be different, having had a chance – this deposition was taken at a time when Brian Ross and I were working at our jobs and could not focus as carefully as we can now here in this trial, unquote?

A. I remember a statement like that.

Q. Do you remember saying that on the witness stand the other day?

A. Yes, yes.

Q. You're aware, Mr. Silverman, I take it, that this lawsuit came to your attention shortly after it was commenced on April 10, 1981?

A. Yes.

Q. Is it correct, sir, that you did [Vol. 23: 4718] discuss the contents of the original complaint served on you in mid April, 1981 not only with Brian Ross, but with various in-house NBC lawyers and various outside lawyers for NBC?

A. I'm sure that's true.

Q. Then did you become aware that I went to New York City in July 1981 to take the testimony at a deposition of Brian Ross?

A. I'm sure I was aware.

Q. Mr. Ross advised you of that; is that correct?

A. I don't recall it, but I'm sure – if that happened, I'm sure he did advise me.

Q. Then, sir, did there come a time when you found on your desk at NBC five volumes of Brian Ross' deposition testimony that had been delivered to your desk by the New York law firm representing NBC?

A. I think that happened.

Q. And then you knew that you would have to come in to give your testimony at a deposition in November 1981; is that correct?

A. I don't recall the exact circumstances, but I think that's correct.

Q. And is it correct, sir, you recall giving five days of testimony, November 9th to the [Vol. 23: 4719] 13th, 1981, in New York City?

A. I don't remember the exact dates, but I remember many days of deposition in this case.

Q. Is it true, Mr. Silverman, that three to four weeks before you even came in to start your testimony in November 1981, you read all five volumes of Brian Ross' deposition first, in order to prepare for your deposition?

A. I don't remember. It's possible.

Q. Let me show you November 9, 1981. May I respectfully bring your attention to page 103, line 21, and go, if you would, to page 104, line eleven. Read it to yourself, if you would, sir, and confirm that that was your sworn testimony five years ago.

A. To where?

Q. To line eleven of the next page. To 104, line eleven.

A. Yes.

MR. GALANE: Question: Have you read the deposition of Brian Ross concerning the conversation with Mr. Dorsey and Mr. Shepard?

Answer: Yes, I have.

Question: How recent did you read Mr. Ross' previous testimony?

Answer: I would say somewhere like [Vol. 23: 4720] three or four weeks ago.

Question: Did you read all of Mr. Ross' deposition?

Answer: Yes.

Question: All five volumes?

Answer: Yes. I think there may have been in one of the books, some pages missing or numbered incorrectly. One little gap.

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TESTIMONY OF PAUL GREENBERG

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[Vol. 21: 4272] Q. (By MR. GALANE) Do you recall what occasioned your writing in the handwritten words, quote, authorities say may have, unquote?

A. Well, I have questions coming to my mind.

Q. Sir, turn to your deposition, page 145 lines six to nine. Was that your testimony in 1982, more than four years ago? Excuse me, 1981, more than five years ago?

A. Well, I assume it is.

Q. Well, do you find you signed this and [Vol. 21: 4273] swore to it? Would you like to look at the back?

A. I believe you.

Q. I'm going to read the question and answer and ask you to confirm if that was your testimony more than five years ago.

Question: Do you recall what occasioned your writing in the handwritten words, quote, authorities say may have, unquote?

Answer: I don't recall but – I don't recall.

Was that your testimony five years ago?

A. Yes.

* * *

TESTIMONY OF PAUL GREENBERG

* * *

[Vol. 21: 4288] Q. Mr. Galane directed your attention to the line eight lines from the bottom of the page which starts with the words, despite his big income. Do you have a recollection now of having written the words in, the handwritten words in by which you testified about?

A. Do I have a recollection?

Q. Yeah?

A. Yes, I do. I wrote those words in.

Q. What was your role when you wrote words in on a script?

A. Well, I functioned in that sense as an [Vol. 21: 4289] editor, whether I was trying for clarity, trying to

make the story more easier to understand, make sure that people understood where various facts came from so that they would be sourced.

Q. Do you know why you wrote the words in, authorities say and then the words, may have?

A. Well, as – in reading it over and looking at the piece I am looking, I'm reading a sentence and it says despite his big income Newton has had financial problems. That's a declaration of fact and I can't, as I look it over I'm saying to me how do we know that? I mean, how can we state that as a fact, I mean, that in the first place that Mr. Newton does have financial problems and then are we sure that he's had financial problems. So I give two suggestions.

Now, what that's supposed to be and when I do it on the average of, you know, 12, 15 scripts a day it goes back and you ask the question, the producer of the unit or whatever I deal with, a foreign producer or domestic producer, they take them back and say, well, Greenberg has questions about this, now, where do you get this from, is it in a newspaper, do you know it for a fact, did he tell you or so forth.

[Vol. 21: 4290] So then some questions are answered and my suggestions are not used. Sometimes they are used.

Q. Do you recall now any discussions about these particular notes that you wrote?

A. Well, I would give this script to Mr. Wolzien who was running special segments and he would take them back to his office and contact either Brian or Ira and they

would rectify it, and as long as I was assured that the questions were answered to the best of Mr. Wolzien's satisfaction and he was satisfied, then I would move on to something else.

Q. Is that what happened here, if you recall?

A. Yes. That's what happened here.

I mean, the question was answered and, you know, the – basically the journalism was served, we tried very hard to get the facts straight and everything in place so nobody would get the wrong impression about the story.

* * *

TESTIMONY BY BOARD CHAIRMAN
RICHARD BUNKER

* * *

[Vol. 14: 2610] Q. (By MR. GALANE) Mr. Bunker, do you recognize Brian Ross?

A. I do.

Q. Did Mr. Ross approach you at some time on that day?

A. He did.

Q. Can you recall when, in relation to the other events that occurred on that day?

A. My recollection is it was at the conclusion of the hearing.

Q. How close did Mr. Ross come to you?

A. Oh, probably within a foot.

Q. Could you observe his facial expressions?

A. I could.

Q. Could you hear the tone of his voice?

A. I could.

Q. Would you describe what it is you heard and observed, insofar as Mr. Ross' demeanor was concerned?

MR. ABRAMS: Your Honor, I object to questions about Mr. Ross' demeanor. This is a libel [Vol. 14: 2611] case about what occurred on the air; it doesn't go to truth, doesn't go to any issue in the case –

MR. GALANE: It does go. State of mind of Brian Ross. Your Honor, hostility toward that proceeding is one of the items of circumstantial evidence, together with what occurred in the corridor, together with other circumstances that I haven't reached in this trial that I outlined to the jury in the opening statement occurred specifically at the home of an individual the day after. I don't have to repeat it until I read the testimony from the depositions. The phone calls to Henry Bushkin, the meeting at Johnny Carson's home, the videotape editing that followed the following week that the jury has seen the schedules of, and from the totality of circumstances it is at least arguable that the jury may weigh this on the question of malice toward Wayne Newton.

* * *

* * *

[Vol. 14: 2613] MR. ABRAMS: Just let me speak, Mr. Galane. The witness is not competent to testify to the state of mind of Mr. Ross. There is evidence here, perfectly probative evidence, evidence as to what NBC knew will eventually come in, what Mr. Ross knew, Mr. Silverman knew, that's relevant evidence. The facial expression of Mr. Ross when he spoke to Mr. Bunker after the hearing does not bear upon any relevant issue in this case and it starts us down a road of a relevancy built upon a relevancy, leading at the end, we're told, at the end to an argument that if you put everything in the same pot you wind up with something. It seems to me it is irrelevant and incompetent and it should not be offered.

* * *

[Vol. 14: 2614] (By MR. GALANE) Mr. Bunker, do you recall the question, sir?

A. I believe so.

Q. Please answer it.

A. After I thought about it, it appeared to me that Mr. Ross was – I guess the best word was he accosted me. He seemed to be unhappy about something. He was –

THE COURT: The question was his facial expression, not what you thought.

THE WITNESS: Oh, his facial expression. Well, it was the look of an unhappy person.

Q. (By MR. GALANE) Let me show you a deposition testimony by yourself sometime ago, sir. I'm referring to page 38, counsel, in Mr. Bunker's deposition. Specifically lines 15 to 25.

MR. ABRAMS: I don't understand, Your [Vol. 14: 2615] Honor, that the witness has failed in his memory about anything –

MR. GALANE: Yes, he has. I'm showing him his previous testimony and ask him to read it and see if it refreshes his recollection as to his description of Brian Ross.

THE WITNESS: Yes, that's basically what it –

Q. (By MR. GALANE) What is it you said at that time?

A. My immediate impression was Mr. Ross was rude, arrogant and accusatory. I dismissed him without a whole lot of consequence or concern.

Q. Mr. Bunker, I request you to use the microphone and speak directly into it. Thank you, sir. Would you please look at page 107, third and fourth lines. Does that refresh your recollection?

MR. ABRAMS: Your Honor, I object to the question. There's no pending question as to what his recollection –

MR. GALANE: As to further description of Mr. Ross. It's a specific reference. That refreshes –

THE COURT: You didn't ask him that question is the objection.

[Vol. 14: 2616] Q. (By MR. GALANE) Did he raise his voice? Did Brian Ross raise his voice?

A. Yes.

Q. Did you do anything as a reaction to the demeanor of Mr. Ross?

A. Well, we were in a very tight, enclosed area, and it was difficult to get around him, but I probably said something to the effect of excuse me. I wasn't about to sit there or stand there and talk to him.

Q. Why?

A. Well, because I didn't like his attitude.

Q. Do you normally treat representatives of the media in that fashion?

A. Absolutely not.

* * *

TESTIMONY OF BOARD CHAIRMAN
RICHARD BUNKER

* * *

[Vol. 14: 2625] Q. Mr. Galane read to you from parts of your deposition about Mr. Ross' demeanor. Do you recall if you said that maybe a better word for his [Vol. 14: 2626] demeanor is that he came on very strong?

A. That's a --

Q. Is that a fair way to describe it?

A. Yes, that would be fair.

Q. He didn't yell at you or anything, did he?

A. Well, no, but he raised his voice. It appeared to me that he was upset about something; I don't know what. That's what it appeared to me.

Q. He didn't touch you, did he?

A. No.

* * *

TESTIMONY OF EDWARD G. PLANER

* * *

[Vol. 10: 1778] Q. Have you ever seen the videotape of [Vol. 10: 1779] Wayne Newton And The Law?

A. I saw it when the program came on, yes, once.

Q. Have you ever seen it since the one time?

A. No.

Q. Did you see it on the night of October 6, 1980?

A. If that's when it aired, yes.

* * *

[Vol. 10: 1780] Q. Was any other impression left upon you when you watched the broadcast of the special segment entitled Wayne Newton And The Law?

A. I remember my major impression was the story was not what it was going to be.

Q. What did you think the story was going to be before you saw the broadcast of the segment entitled Wayne Newton And The Law?

A. Well, I happen to like Wayne Newton as an entertainer going back to Danke Schoen with Tommy Dorsey on his program years ago. I have seen him in – I have seen him become a very big entertainer in Las Vegas.

I figured this was a special segment about Wayne Newton in Las Vegas. I had read magazine articles somewhere along the line that Wayne Newton had become a multi-millionaire, that he was sensational. I figured that was a story.

Q. What impression was left upon you when you watched the broadcast on the night of October 6, 1980 of the special segment entitled Wayne Newton And The Law?

A. I guess my impression was that it wasn't what I thought it was going to be and that [Vol. 10: 1781] Wayne Newton was probably in some sort of trouble.

Q. Can you add to what you previously said was your impression of what you viewed? Do you recall your previous testimony?

A. No, I really can't.

Q. A few answers back I asked you to describe what you thought you saw. Do you remember that testimony?

A. I remember what I said. Can I add to that, my answer is no.

Q. What do you remember you saw?

A. Something about Wayne Newton and the Aladdin casino and a loan with some mobsters.

Q. Can you think of anything else to add to your answer you have just given as far as the impression on you is concerned?

A. No.

* * *

TESTIMONY OF MARY L. FLYNN

* * *

[Vol. 10: 1799] Q. What was the thrust of the special segment broadcast entitled Wayne Newton And The Law broadcast on October 6, 1980?

A. The story alleged that Mr. Newton had wanted to purchase the Aladdin Hotel. The story said Mr. Newton wanted to purchase the Aladdin Hotel and it reported that Mr. Newton, one of Mr. Newton's friends who had alleged ties to the Mafia, excuse me, organized crime, had worked something out.

Q. Have you finished your answer?

A. Yes.

Q. What do you mean by quote worked something out?

A. That the friend made it possible so that Mr. Newton could buy the Aladdin Hotel.

Q. What do you mean by making it possible so Mr. Newton could buy the Aladdin Hotel?

A. I guess he had the connections to help Mr. Newton.

Q. What do you mean by quote connections in your last answer?

A. Business contacts.

Q. What do you mean by business as you used it in your last answer?

A. People who were going to help Mr. [Vol. 10: 1800] Newton get the money to buy the hotel.

* * *

No. 91-203

Supreme Court, U.S.
FILED
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

CARSON WAYNE NEWTON, AKA: WAYNE NEWTON,

Petitioner,

—v.—

NATIONAL BROADCASTING COMPANY, INC., BRIAN ELLIOT ROSS, IRA SILVERMAN and PAUL GREENBERG,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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Question Presented

Did the Court of Appeals err in determining that the evidence in a libel trial commenced by a public figure against a broadcaster and its employees failed to demonstrate actual malice with convincing clarity when virtually all of the facts broadcast were uncontroverted and there was no basis for concluding that the journalists who prepared the broadcast doubted the truth of what they broadcast or deliberately left a false impression about the plaintiff?

Parties Below

The parties to the proceedings below were Carson Wayne Newton, a/k/a Wayne Newton, plaintiff, and National Broadcasting Company, Inc., Brian Ross, Ira Silverman and Paul Greenberg, defendants.

Pursuant to Supreme Court Rule 29.1, National Broadcasting Company, Inc. ("NBC") advises the Court that it is a wholly-owned subsidiary of National Broadcasting Company Holding, Inc., which is a wholly-owned subsidiary of General Electric Company. NBC has no affiliates or subsidiaries other than wholly-owned subsidiaries, with the exception of the following:

(a) a wholly-owned subsidiary of NBC, NBC Cable Holding, Inc., owns a number of wholly-owned subsidiaries each of which has an interest in a number of cable-related companies, with the remaining interest in such companies being owned by unrelated companies.

(b) a wholly-owned subsidiary of NBC, NBC News Overseas, Inc., has a 37.5% interest in Visnews, Limited, with the other 62.5% interest being held by Reuters Limited and British Broadcasting Corporation.

(c) NBC has an 81.25% interest in Mobile Image Limited, a U.K. company.

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RESPONDENTS' BRIEF IN OPPOSITION

STATEMENT OF THE CASE

On October 6, 1980, NBC News ("NBC") broadcast on its Nightly News program a report about an ongoing federal investigation of the relationship of two leading organized crime figures with Wayne Newton ("Newton"), a Las Vegas entertainer who had recently been licensed to operate a casino in that city. Prepared over a three-month period by two NBC journalists, Brian Ross ("Ross") and Ira Silverman ("Silverman"), the report raised serious questions both about Newton's relationships with organized crime figures and about the truth of Newton's testimony before the Nevada gaming authorities about those relationships.

Newton sued for libel on April 10, 1981, in the United States District Court for the District of Nevada sitting in Las Vegas. On December 17, 1986, after a trial lasting 37 trial days, a jury found NBC, Ross, Silverman and Paul Greenberg (the executive producer of the broadcast) liable for defaming Newton. The jury awarded Newton $19,271,750 in damages (over $22 million when pre-judgment interest was added) consisting of $9,046,750 for loss of past and future income, $5 million for loss of reputation, $225,000 for physical and mental suffering and $5 million in punitive damages. (A 5-7)[1]

In response to defendants' motion for judgment notwithstanding the verdict and in the alternative for a new trial, the district court upheld the jury's verdict of liability and its awards of damages for pain and suffering and punitive damages. It set aside the damages for lost past and future income, ruling that Newton "failed to establish by a preponderance of the evidence that the broadcasts in question had any causal connection to any alleged loss of past or future income" (A 82), and also the $5 million for damage to Newton's reputation, stating that the award "shocks the conscience of the court because the broadcasts did not tarnish [Newton's] outstanding reputation." (A 17, 80) The district court directed Newton to file a remittitur of all sums except $5,275,000 or participate in a new trial on liability and damages which, in the interests of justice, would take place in the Central District of California. (A 75, 83; ER 304-05)[2] "Put to

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1 The following abbreviations are used in this brief: "Pet." for the petition for a writ of certiorari, "A" for the appendix to the petition for a writ of certiorari, "ER" for the Excerpts of Record filed with the Court of Appeals, "RT_____:_____" for the volume and page of the reporter's transcript of the trial proceedings and "Ex. _____" for the exhibits admitted into evidence at trial.

2 NBC and its journalists had repeatedly moved for a change of venue from Las Vegas to any other judicial district where the case could have been brought, including the Central District of California, on the ground that Newton's unparalleled popularity in Las Vegas would prevent them from receiving a fair trial in that venue. (A 6; ER 157, 184-

the choice," as the Court of Appeals later phrased it, "of a new trial outside Las Vegas or filing the remittitur, Newton filed the remittitur." (A 8)

The Court of Appeals for the Ninth Circuit (Chief Judge Goodwin and Judges Nelson and Norris), in a unanimous opinion dated August 30, 1990, reversed the judgment and ordered judgment entered dismissing the complaint. (A 1-60) The Court's opinion was based, in its entirety, on the failure of Newton to prove that NBC had broadcast its reports with actual malice.[3] Applying the test frequently reasserted by this Court that actual malice is proveable in a public figure libel case only by clear and convincing evidence that the defendant "realized that his statement was false or that he subjectively entertained serious doubt as to the truth of his statement," *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485, 511 n.30 (1984); *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989), the Court determined that there was "almost no evidence of actual malice, much less clear and convincing proof." (A 60)

The Court of Appeals first considered the appropriate standard of review of the jury's finding of actual malice. Determining that all credibility findings of the jury were entitled to "special deference" and that "the presumption of correctness" applied "with less force when a factfinder's findings rely on its weighing of evidence and drawing of inferences" (A 15), the Court reviewed in laborious detail the evidence on the question of actual malice. (A 19-59) Much of that evi-

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85) Notwithstanding that all visitors who arrive at the airport in Las Vegas are obliged to drive on Wayne Newton Boulevard as they head towards the city (RT 6:936, 8:1310-11), that Wayne Newton Day has been celebrated by the city (*id.*), and that undisputed polling results indicated that NBC could not receive a fair trial in Las Vegas (ER 154-55) because Newton is (as the Court of Appeals later determined) so "revered" there (A 17), the district court denied the motions. (A 6; ER 157, 184-85)

3 NBC had made a number of other arguments for reversal which, as a result of the dispositive nature of the Court of Appeals' ruling, the Court did not reach. (A 8 n.5)

dence, the Court pointed out, was not in dispute (A 19) since "almost all of the facts reported by NBC in the October 6, 1980 broadcast are uncontroverted." (A 39)[4]

Reviewing the entirety of the evidence, the Court concluded that Newton had failed to prove actual malice. Newton's argument—repeated in his petition to this Court—that NBC had deliberately left a false impression about him was rejected on the basis of a total failure of proof. (A 40-59) Based on the entirety of the record and without making any credibility judgments of its own, the Court reversed the judgment of the district court.

Newton then petitioned for rehearing with a suggestion for rehearing en banc. On April 5, 1991, the panel amended its opinion in a few minor respects, and unanimously voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. (A 61-63) The full Court of Appeals was advised of the suggestion for en banc rehearing, but no judge requested a vote on this suggestion. (A 63-64) Newton then filed his petition to this Court for a writ of certiorari.

STATEMENT OF FACTS

"For the most part," the Court of Appeals correctly observed, "the facts in this case are not in dispute." (A 19) Those facts related to Newton's relationships with highly placed figures in organized crime, investigations by the FBI and Nevada authorities about those relationships, and the preparation of a television news report by NBC News about the same topic.

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4 By way of example, key exhibits in the case included a tape of Newton's interview with Nevada gaming investigators, his taped testimony before the Nevada Gaming Board and the transcript of his grand jury testimony. (A 21 n.21, 23, 102-22)

The Wayne Newton-Guido Penosi Relationship

During the first half of 1980, the Federal Bureau of Investigation ("FBI") was investigating Frank Piccolo ("Piccolo"), a high level Connecticut mob leader in the Gambino organized crime "family." (RT 28:5983, 13:2369-72; Ex. 613 at 4) Pursuant to judicial authorization, the FBI overheard Piccolo's telephone conversations including ones between Piccolo and his cousin Guido Penosi ("Penosi"). Penosi was a leading narcotics dealer in Southern California who was associated with both the Gambino and Lucchese organized crime families and who had (after his conviction for murder as a juvenile) twice been convicted of felonies. (RT 24:5217-19; Ex. 639) The topic of some of the conversations of these two mob leaders was Wayne Newton and his projected purchase of the Aladdin Hotel and Casino in Las Vegas, Nevada (the "Aladdin").

By 1980, Newton had achieved extraordinary national recognition as an entertainer, with his fame reaching unprecedented heights in Las Vegas where he resided and performed in hotel showrooms. (Exs. 853-54) Prior to 1980, Newton had had a long and close relationship with Penosi:

> —In the 1960's, Penosi attended Newton's performances at the Copacabana Club in New York a couple of times a week over a six-month period; they spoke often and Penosi provided a form of protection for Newton, keeping people he did not know away from him. (RT 3:355-64; Ex. ABP at 39)
>
> —During that period, Penosi and Carmine Tramunti, who became the boss of the Lucchese family, gave Newton an inscribed watch worth between $2,000 and $2,500. (RT 3:395-97, 28:5778; Ex. 457)
>
> —Newton and Penosi dined together in Florida, both at Penosi's home and in a restaurant. (A 19-20; RT 3:371-99, 6:974)
>
> —Penosi attended the wedding of Newton's brother in Las Vegas, met with Newton on that occasion and with

Newton's parents (on a visit to Newton's home) on another occasion. (A 19; RT 3:401-03, 6:974, 11:2023)

—Newton's office calendar noted Penosi's birthday. (A 19)

—In 1976, Newton flew to Los Angeles in his private plane with his manager, conductor and three members of his band, to perform without compensation on a television pilot being produced by Penosi's son. (A 20; RT 3:380-82, 6:980-81) Penosi thanked Newton profusely for this favor and offered to help Newton in the future. (ER 229; RT 6:980-82)

—In 1979, in another favor to Penosi, Newton advised the Las Vegas police of a forthcoming visit by Penosi so that Penosi could avoid having to register with the police (as required by law for all ex-felons). (A 20; RT 6:984-85)

—Newton initially invited Penosi to stay at his home during Penosi's 1979 visit to Las Vegas, but then arranged for him to stay without paying at a hotel. During his visit, Penosi saw Newton in his dressing room, was driven to Newton's home in a car Newton provided, talked with Newton there, and brought a saddle as a present for Newton's daughter. (A 20 & n.18, RT 3:366-68, 6:986-90, 9A:62A, 67A-69A)

In 1980, Newton secretly took up Penosi on his long-standing offer of help. After Newton refused to make further payments which he had allegedly promised to make in connection with an investment in a Las Vegas tabloid, Newton had a physical altercation with the tabloid's publisher and another man who was involved in organized crime. (A 53-54) Shortly after, telephone threats directed at Newton and his daughter began to be made by a man named Dapper, himself involved in organized crime. When the Las Vegas police were unable to stop the threats, Newton, rather than contacting the FBI or any other police entity, contacted his old friend, Guido Penosi. (A 20 & n.19)

Penosi, in turn, told Newton to call his cousin, "Frank," in Connecticut, and Newton called Frank Piccolo to enlist his aid. From the FBI recordings of Piccolo's telephone conversations, it was learned that Piccolo went to a "sit down" in the Bronx, New York, with members of the Genovese crime family where it was agreed that those threatening Newton would leave him alone. The threats against Newton ceased. (A 20-21 & n.20) Penosi then came to Las Vegas and visited with Newton in his dressing room. Newton, who believed that Penosi had saved his daughter's life, thanked Penosi for his help. (A 21-22)

Around the same time, Mark Moreno ("Moreno"), Newton's long-time friend and business associate, began receiving similar threats. Moreno went to Newton, who told him to call Penosi. (A 22) He did so and Penosi in turn told Moreno to call Piccolo. Moreno did so and when Piccolo said "there is other people that I must speak to about this," Moreno saw himself "being the center of discussion in a room filled with a lot of mob people." (RT 15:2800-01) A few days later, Penosi asked Newton to call Piccolo to verify that Moreno was "with" him. Once again, Newton called Piccolo to ask for his assistance. Again, Piccolo met with members of the Genovese family and an agreement was reached for Penosi personally to pay $3,500 to have the threats against Moreno called off. The threats against Moreno then ceased. (A 22 & n.22)

Having done a major favor for Newton, Piccolo began to seek to "earn" from Newton. He did so first by pressing Moreno to buy life insurance for Lola Falana, a Las Vegas entertainer who was a friend of Newton's and was then being managed by Moreno, through an insurance agent introduced to Moreno by Piccolo.[5] (A 22-23) Moreno tried to stall

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5 As Piccolo phrased it in a telephone call to Penosi: "We'll earn it back with the guy. First of all, on the insurance guy, something should come back . . . ." (Ex. 328 at 8) On another taped telephone call, Piccolo expressed his intentions more bluntly: "I want to earn on any fucking thing . . . . Whatever he earns, he's got to give us a piece, any fucking thing he earns." (ER 193) Throughout their

because he feared that he was becoming involved with Piccolo whom he understood was involved in organized crime. (RT 15:2804-05) Moreno told Newton about the efforts to pressure him to buy insurance and that it was "a *quid pro quo*, as a favor" for the help the organized crime figures had given to Newton and Moreno. (ER 225-26; RT 7:1078-80)

NBC's Investigation

Wayne Newton's decision to seek the assistance of highly placed organized crime figures ultimately led not only to the FBI learning of his communications with the mobsters but also to NBC doing so. In early July 1980, Ross and Silverman, two NBC journalists who specialized in investigative reporting on organized crime, learned of the ongoing investigation of Piccolo. They learned that wiretaps existed of conversations between Piccolo and Penosi about Newton and Moreno. The reporters were told that the conversations (as the Court of Appeals put it) "seemed to involve Wayne Newton and the Aladdin Hotel. Federal law enforcement officials were interested in investigating the connection between high-level Mafia figures and Newton's contemplated purchase of the Aladdin." (A 23)

Ross and Silverman traveled to Las Vegas where they continually sought—unsuccessfully—to interview Newton. When they called Newton himself, he inquired through his secretary what the topic of the interview would be. When told it would be "the Aladdin and Guido Penosi" he refused the interview. (A 38-39) The reporters also sought to interview Newton with the assistance of Moreno, of a public relations executive and of the news director of the local NBC affiliate in Las Vegas who was a friend of Newton's. (A 38-39 & n.36; RT 24:5113, 15:2878, 2890) Newton declined all such requests. The

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discussions about Newton, Piccolo and Penosi referred to the status of Newton's efforts to purchase the Aladdin (*e.g.*, Penosi: "they're throwing roadblocks and all that bullshit . . . you know . . . and, ah . . . they don't want him to have the hotel;" Piccolo: "Yeah, but it would be nice if [Newton] would." (A 23 n.23)

reporters met with two Nevada Gaming Board agents who were investigating Newton, but received little information (A 99-101), and they attempted, unsuccessfully, to interview Penosi at his apartment in Beverly Hills. (RT 25:5250-51, 9A:219A) Ross did learn, however, from a particularly knowledgeable confidential source that Piccolo had been asked by his associates in the Gambino family if he wanted to go in with them in Atlantic City and Piccolo said he did not because he had taken care of a problem for Wayne Newton and was going to have some sort of interest in the Aladdin with Newton. (A 27-30)

Investigation by the Nevada Gaming Authorities

While the NBC journalists were pursuing their investigation, the Nevada gaming authorities were conducting their own investigation of Newton. Newton answered questions under oath asked by several Nevada Gaming Board investigators led by Fred Balmer ("Balmer"), the senior of four Board investigators assigned to conduct the investigation of Newton. (A 23-24) Balmer asked Newton to set forth "his entire relationship with Mr. Penosi" (RT 11:1908-09) and gave Newton "a more than adequate opportunity during the interviews that we conducted with him to tell us anything that he knew about Mr. Penosi." (A 24 n.25) Newton told the agents only about seeing Penosi at the Copacabana Club and (misleadingly) that "Guido called me or I called him" about the threats in 1980. He falsely professed ignorance about any action taken by Penosi, stating that the threats to him had continued. (A 24-26) Newton did not tell Balmer of the threats to Moreno; of his own calls to Piccolo; or of speaking on two separate occasions with an individual in the east at Penosi's request in an effort to stop the threats;[6] nor did he tell Balmer about any of the other contacts that had

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6 At trial, Newton testified that he did not do so because "[i]t didn't occur to me." (A 26 n.26) Another Board agent testified, in regard to whether Newton mentioned making calls to associates or relatives of Penosi in the east, "He did not, and he was asked." (RT 16:3069)

occurred over the years between himself and Penosi. (A 26-27)

On September 25, 1980, the reporters attended a public hearing held by the Gaming Board. Newton testified generally about meeting Penosi at the Copacabana and seeing him in Florida, but testified falsely that Penosi never visited him in his home. (A 32 & n.30) Newton did not tell the Board about any of the other contacts between himself and Penosi, and particularly, Newton's request for assistance from Penosi and Piccolo. Newton falsely summed up his relationship with Penosi by stating: "In the approximately 21 years from the time I met him, I might have seen this man four times. So my relationship is just that of a fan, really." (A 33)[7]

At the Board hearing, the NBC journalists also heard representatives of the Valley Bank of Nevada testify that the Valley Bank was providing the financing for Newton to acquire his interest in the Aladdin.[8] On the basis of the sworn-to information provided to them, the Gaming Board recommended that Newton be licensed. (A 35) When Ross

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7 Newton's explanation at trial for the "four times" was that he had seen Penosi on four "occasions"—in New York for a number of months, in Florida on more than one occasion, in Las Vegas (for the wedding of his brother) and in Las Vegas again (in 1979 when Penosi visited that city). (RT 7:1107-08) Even this creative accounting by Newton omitted the 1976 meeting with Penosi in Los Angeles on the occasion of the television pilot Newton performed *gratis* as a favor to Penosi, their 1980 meeting in Las Vegas after the threats ended, and all the telephone communications between them.

8 At trial (and in his current petition) Newton claimed that because Ross and Silverman heard the testimony about the Valley Bank, they must have known that Piccolo could not have become a hidden partner in the Aladdin. However, as the testimony of Newton's organized crime expert, Prof. G. Robert Blakey, made plain, the fact that the Valley Bank provided the financing for the Aladdin did not begin to answer the question of whether any hidden interest existed. Prof. Blakey testified that a hidden interest in a casino is normally not actual ownership of a hotel but an interest in the "skim," the amount of casino receipts not reported to the appropriate authorities as receipts. Such an interest would not be reflected in corporate documents or materials "available for public surveillance and public review." (A 55)

and Silverman informed one of their law enforcement sources about Newton's testimony before the Gaming Board about Penosi, their source said that Newton was not telling the whole story. (A 31)

Immediately after the hearing, Ross sought, once again, to interview Newton. In response to questions from Ross, Newton falsely stated that he had last spoken with Penosi "maybe a year ago" and falsely stated that Penosi had made no telephone calls to him. (A 35, 120-21) Newton became visibly angry and did not respond to other questions posed by Ross as he followed Newton to a car in the parking lot. At the car, Ross asked Newton about threats made upon his family, inquiring whether Penosi had ever been in Las Vegas to provide protection for his children. Frank Fahrenkopf ("Fahrenkopf"), Newton's long-time attorney who had represented him in his successful effort to be licensed to own and operate the Aladdin, disparagingly replied, "[c]ome on, that's silly." No other answer or explanation was offered by Fahrenkopf or Newton then or at any time prior to filing suit. (A 35-36, 122)[9]

The following day, the Nevada Gaming Commission held its own hearing, approved the recommendation of the Gaming Board and granted Newton a license to own and operate the Aladdin. At the hearing, Fahrenkopf submitted an affidavit by Newton concerning Penosi which referred to Penosi's 1979 visit to Las Vegas and to Newton's appearance on the television pilot produced by Penosi's son. (A 36) The affidavit made no reference to any other aspects of the long-standing Newton-Penosi relationship—omitting, among other things, any reference to the assistance provided Newton by Penosi and Piccolo just months earlier, the fact that Newton credited them with saving his and his daughter's lives, and that Piccolo had already sought to start to "earn" from him. The affidavit was understood by members of the Commission

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9 At trial, it was revealed that not until after the Gaming Board hearing did Newton even disclose to his own lawyer Fahrenkopf *any* information about his relationship with Penosi. (RT 5:703-04, 713-14, 6:872-73, 7:1153-57)

to mean that Newton had had no connections with Penosi and his son other than as stated in the affidavit. (RT 30:6255)

Final Pre-Broadcast Preparation

Towards the end of their preparation of the broadcast, Ross and Silverman interviewed Johnny Carson, who had himself sought to purchase the Aladdin Hotel at an earlier time. Carson had no information of relevance to the broadcast. (A 36 & n.34)

When the reporters sent a telegram to Moreno advising him of their story, Moreno called Ross and said that Newton's contacts with Penosi had nothing to do with the purchase of the Aladdin, but concerned death threats against Newton and his family and that this matter would be fully disclosed in an affidavit being prepared by Fahrenkopf. (A 37-38)

When the affidavit was submitted, however, it contained nothing at all about threats. Newton himself had previously raised questions about Moreno's truthtelling by (as the Court of Appeals summarized) "testif[ying] falsely" that Moreno "was only a friend, that Moreno had no business or contractual position with him, and that Moreno was not his manager." (A 33-34). That testimony was wholly inconsistent with what Moreno had told Ross. Given the absence of any reference to threats in the affidavit, the questions raised about Moreno's credibility and, in particular, Fahrenkopf's authoritative dismissal (in Newton's presence) of the very notion that Newton had been threatened, the broadcast did not refer to threats.

The October 6, 1980 Broadcast

On October 6, 1980, the NBC Nightly News included, as a Special Segment, a report entitled "Wayne Newton and the Law." Penosi was described as "a New York hoodlum from the Gambino Mafia family, a man with a long criminal record, now believed to be the Gambino family's man on the

West Coast, in the narcotics business and also in show business." The broadcast noted that Penosi was a "key figure" in an ongoing federal grand jury investigation of the activities of the Gambino family in Las Vegas and that this investigation also involved Wayne Newton. Newton's purchase of the Aladdin was noted, as was the fact that a federal grand jury was investigating the role of Penosi and the mob in Newton's deal for the Aladdin. The broadcast stated accurately that Newton had had financial problems and it continued:

> "Investigators say that last year, just before Newton announced he would buy the Aladdin, Newton called Guido Penosi for help with a problem. Investigators say whatever the problem was, it was important enough for Penosi to take it up with leaders of the Gambino family in New York. Police in New York say that this mob boss, Frank Piccolo, told associates he had taken care of Newton's problem, and had become a hidden partner in the Aladdin hotel deal." (A 4)

The broadcast showed Newton testifying before the Gaming Board on the subject of his relationship with Penosi: "on the basis of which I've known him [Penosi], I don't think that there has been a relationship." The broadcast then stated that "[f]ederal authorities say Newton is not telling the whole story, and that Newton is expected to be one of the first witnesses in the grand jury investigation."[10] The broadcast concluded with Ross stating that "[f]ederal authorities say they know of at least 11 phone calls Penosi made to Newton's house in one two-month period" and asserting that these and other matters would be considered by a federal grand jury. (A 3-4, 88-92)

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10 The Court of Appeals, after marshalling all the relevant evidence, concluded that "[t]he record is clear that Newton, in fact, did not tell the whole story to Nevada state gaming authorities. . . . And the record reveals that NBC's statement was accurate, even without attribution to federal authorities." (A 41 n.38)

Subsequent Events

One month after the October 6 broadcast, Newton and Moreno testified before a federal grand jury in Connecticut. Newton was asked a number of questions about the relationship between his telephone calls to Penosi and Piccolo and his purchase of the Aladdin Hotel. (A 56 n.45) In the course of his grand jury testimony, Newton described in detail—as he had not done at all to the Nevada gaming authorities—his calls to Penosi's cousin "Frank;" his meeting with Penosi in his dressing room in February 1980 after the threats against him had ceased; his telling Penosi how appreciative he was that the threats had ended; and Moreno telling Newton that Frank had said that, as "a favor for getting [Moreno] off the hook," he wanted Moreno to take out an insurance policy on Lola Falana through a Connecticut insurance agent whose name was given to Moreno by Frank. Newton also testified before the grand jury that he understood that Frank asked for the insurance policy "as a *quid pro quo*, as a favor for him helping" Newton and Moreno. (ER 223-26)

On November 6, 1980, a portion of the NBC Nightly News narrated by Ross recounted Newton's appearance that day before the grand jury. (ER 74-76) Several months later, on June 12, 1981, Piccolo and Penosi were indicted by the grand jury for attempted extortion of Newton, Falana and Moreno. (A 39; ER 231-33) The indictment was the subject of a report that evening on the NBC Nightly News. (ER 84-86)[11]

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11 Piccolo was shot to death in a Bridgeport, Connecticut telephone booth in September, 1981. (Exs. 616, 840-45) Penosi was tried in March 1982, but the jury was unable to reach a verdict. Penosi was retried in May 1982 and acquitted (Ex. 634), having argued to the jury that it was Piccolo and not Penosi who had sought to extort money from Newton. (Ex. ABP at 42-56)

ARGUMENT

THERE IS NO CONFLICT IN THE CIRCUITS OR BETWEEN THE RULING OF THE COURT OF APPEALS AND ANY RULING OF THIS COURT WHICH WARRANTS PLENARY CONSIDERATION BY THIS COURT

The petition sets forth three questions purportedly raised by the unanimous ruling of the Court of Appeals. Not one is the subject of any conflict among the circuits or between the court that rendered it and any other federal or state court. Nor does the petition even claim that any such conflict exists.

What the Court of Appeals did in this case was singularly unexceptional and unexceptionable. After detailed examination of the entire record in this action, it applied the well-established and not at all controversial rule of law " 'that in cases raising First Amendment issues . . . an appellate court has an obligation to "make an independent examination of the whole record" in order to make sure that "the judgment does not constitute a forbidden intrusion on the field of free expression." ' *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485, 499 . . . (1984) (quoting *New York Times* [*Co.* v. *Sullivan*,] 376 U.S. [254,] 284-286 [(1964)] . . .)." *Milkovich* v. *Lorain Journal Co.*, 110 S. Ct. 2695, 2705 (1990).

There is, of course, some tension between the constitutional obligation of independent review and the deference usually accorded by appellate courts to findings of fact made by a jury. This tension was most recently addressed and resolved in *Harte-Hanks Communications, Inc.* v. *Connaughton*, 491 U.S. 657, 688 (1989):

> "Although credibility determinations are reviewed under the clearly-erroneous standard because the trier of fact has had the 'opportunity to observe the demeanor of witnesses,' *Bose*, 466 U.S., at 499-500, the reviewing court must ' "examine for [itself] the statements in issue and the circumstances under which they were made to

> see . . . whether they are of a character which the principles of the First Amendment . . . protect,'' ' *New York Times Co.*, 376 U.S., at 285 (quoting *Pennekamp* v. *Florida*, 328 U.S. 331, 335 (1946)).''

The petition does not allege that the Ninth Circuit ruling in this action is in any way inconsistent with this standard of appellate review. In fact, the record before the Court was, in almost all respects, undisputed; the decision was based on evidence as incontrovertible as FBI and Nevada Gaming Board tapes, the transcript of Newton's grand jury testimony, and Newton's own admissions at trial. As the court concluded:

> ''In sum, almost all of the facts reported by NBC in the October 6, 1980 broadcast are uncontroverted. Newton went to Penosi with a problem and Penosi called Piccolo who helped solve the problem. Piccolo and Penosi later discussed 'earning off' Newton and possibly 'earning off' his ownership of the Aladdin Hotel. Piccolo and Penosi were investigated and indicted by a federal grand jury, which heard the testimony of Wayne Newton. All these facts are beyond dispute.'' (A 39)

The petition does not allege otherwise.

Instead the petition argues that the opinion of the Ninth Circuit conflicts with Justice Scalia's concurrence in *Harte-Hanks*, which contends that an appellate court's ''independent assessment of whether malice was clearly and convincingly proved'' should be based upon ''the assumption that the jury made all the supportive findings that it reasonably could have made.'' 491 U.S. at 700.[12]

The argument of the petition, however, is misplaced, *for the Ninth Circuit did not reject any relevant subsidiary factual finding that a jury could reasonably have made.* The petition attempts to evade this decisive point by resorting to a

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12 By contrast, the opinion for the Court in *Harte-Hanks* considered ''the undisputed evidence'' and deferred to only certain ''findings'' that ''the jury *must* have'' accepted. *Id.* at 690-91.

scattered array of allegations, none of which, even if fully credited, refer to subsidiary findings of fact which a jury could reasonably have made and which could support a constitutional inference of actual malice. These allegations fall into two general categories.

The first category consists of those allegations that do not refer to disputed facts, but instead contest the legal implications of facts that are non-controverted. An example is the petition's discussion of Ross and Silverman's interview of Johnny Carson. (Pet. at 16-17) Apart from its distortion of the record,[13] this discussion does not refer to any disputed subsidiary issue of fact at all.[14] It simply leaps by sheer force of will from the unremarkable fact that the reporters interviewed a potentially newsworthy source (who in the end could provide no information), to the ultimate *legal* conclusion of actual malice.[15]

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13 The petition states that "Carson testified that he could not remember being asked any questions" (Pet. at 16), when in fact Carson testified that "[t]hey may have asked questions if I knew anything about what was going on and I said, no . . . . Whether they asked any questions, I do not recall." (A 137) The petition states that "the reporters had already drafted the broadcast's script before going to Carson's home" (Pet. at 16), whereas in fact the evidence establishes only that the reporters had "worked" on a "draft" of the script before meeting Carson. (A 139-40) Petitioner similarly attempted to distort Carson's testimony in his brief to the Ninth Circuit. (A 36 n.34)

14 There is no evidence in the record from which a reasonable jury could have found, as a subsidiary fact, that a relationship existed between the NBC reporters and Carson so as to motivate the reporters falsely to defame Newton. It is uncontroverted that the reporters had never met Johnny Carson prior to working on the story; that Carson had made no request that the story be covered and had offered no suggestions about what it should say; and that both before and after the broadcasts Carson had not the faintest idea who the reporters were. (RT 16:3180-82, 23:4760-64, 4804, 4864, 24:5101-02)

15 The desperation of this leap is finely illustrated by the petition's citation to *Harte-Hanks*' unexceptional conclusion that it is probative of

The petition makes a similar point in its reference to Ross's purported agitation after Newton's testimony before the Nevada Gaming Board and during Ross's attempt to interview Newton immediately afterwards. Newton's remarks on both these occasions were, as the Ninth Circuit tactfully put it, false. (A 32-35) There is no factual dispute that, having witnessed Newton responding falsely to questions of the gaming authorities, that Ross aggressively sought to probe Newton's responses to the questions he had been asked. With respect to this incident, the petition's real complaint, therefore, is that the "Ninth Circuit . . . refused to regard" Ross's supposed agitation as "probative of actual malice."[16] (Pet. at 19-20) Newton's claim is thus nothing more or less than that the Ninth Circuit incorrectly applied the constitutional standard of actual malice. Plainly, this has nothing whatever to do with Justice Scalia's concurrence in *Harte-Hanks*.[17] Neither the definition nor the application of

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actual malice to establish that journalists are committed to defamatory accusations in advance of their purported investigation of those accusations. This conclusion has no relevance whatever to the interview of Johnny Carson, which was, on the basis of all the evidence, a routine part of the reporters' newsgathering efforts. (A 36 & n.34)

16 Once again, the desperation of the petition's citation to *Harte-Hanks* should not slip by unnoticed. *Harte-Hanks* reached the commonsense conclusion that evidence establishing that journalists deliberately refused to interview a crucial witness, in the context of other evidence establishing a pattern of reckless indifference to the truth, can be probative of actual malice. The petition attempts to bring this case within that conclusion by fantastically transforming Newton's evasion of Ross's attempted interview into a "request to conduct an interview at another time and place." (Pet. at 20; but see A 121) In so doing, however, the petition conveniently overlooks the undisputed evidence that Newton had repeatedly rebuffed numerous previous efforts to interview him. (*See* p. 8, *supra*.)

17 Several of the petition's allegations, when analyzed, are similar. They ultimately represent petitioner's disagreement with the legal significance that the Ninth Circuit attributed to undisputed facts. Included within this category are, for example, the petition's allegations that Ross and Silverman had heard that the Valley Bank was financing Newton's purchase of the Aladdin Hotel. (Compare Pet. at 22 with A 54-55 and p. 10 & n.8, *supra*.)

the legal standard of actual malice was at issue in *Harte-Hanks*. And, in fact, neither the legal definition of actual malice nor the application of that standard to the facts of this case are even asserted by Newton to be "Questions Presented."[18]

The second category of allegations contained in the petition consist of those which refer to peripheral and immaterial factual disputes, whose resolution would be irrelevant even to a legal determination of actual malice. A good example is the petition's reference to the factual dispute, considered by the Ninth Circuit, surrounding the source of Ross's knowledge of police information about Piccolo. (Compare Pet. at 21-22 with A 27-30) The Ninth Circuit left this dispute unresolved because its settlement was irrelevant to a legal determination of actual malice. Even if the Ninth Circuit were fully to credit the testimony of the New York City police officials who stated that they could not locate records of overheard conversations between Piccolo and other mob figures on the subject of Piccolo's association with Newton and the Aladdin Hotel, the most that would follow is that the broadcast's attribution of the New York police as the source of its information would be called into question. What cannot be questioned, however, is the reality of the relevant FBI wiretaps, introduced into evidence by Newton himself. (*See* p. 7 n.5, *supra*) No question of actual malice could possibly hinge on

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18 "The question whether the evidence in the record in a defamation case is sufficient to support a finding of actual malice is a question of law . . . . In determining whether the constitutional standard has been satisfied, the reviewing court must consider the factual record in full." *Harte-Hanks*, 491 U.S. at 685, 688. Impeachment of the Ninth Circuit's conclusions regarding actual malice, therefore, would require the petition to assess the Circuit Court's evaluation of the entire record. Given the Ninth Circuit's careful and comprehensive mastery of the voluminous but generally indisputable evidence in this case, the petition does not and can not attempt this task, preferring instead to chip away at minor and discrete points. But because actual malice can neither be established nor negated by this method, the petition is thereby also forced inaccurately to characterize its challenge to the Ninth Circuit in terms of the appropriate scope of independent review.

where statements made by Piccolo evidencing his illicit plans reposed.[19]

The allegations contained in the petition, therefore, do not fairly turn on any legal question left open by *Harte-Hanks*, or on any conceivable conflict with Justice Scalia's concurrence in that case. Nor does the ruling of this Court in *Masson* v. *New Yorker Magazine, Inc.*, 111 S. Ct. 2419 (1991), have anything to do with this case. Whatever questions may still remain in libel cases as to the legal impact of misquoting sources, no such issue is or could conceivably be raised here. As for the suggestion in the petition that *Masson* somehow alters the guidelines of *Bose Corp.* v. *Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984), and *Harte-Hanks*, nothing in *Masson* lends any support at all to that contention.

In *Masson* summary judgment had been granted by a trial court in favor of a defendant in an action for defamation. This Court enunciated and applied the ordinary legal standards appropriate to summary judgment. These standards express Seventh Amendment concerns that plaintiffs be accorded every reasonable opportunity to have their full day in court. For this reason *Masson* held that in evaluating a motion for summary judgment a trial judge should "draw all justifiable inferences in favor of the nonmoving party,

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19 Another allegation that concerns an irrelevant factual dispute is the petition's claim that Ross and Silverman knew at the time of the broadcast that the "problem" for which Newton sought Penosi's assistance concerned threats made against Newton and his daughter. (Pet. at 17-18) Entirely aside from the fact that Newton's lawyer (in Newton's presence) ridiculed the very notion of Newton having been threatened (p. 11, *supra*), acceptance of the petition's version of events carries, as the Ninth Circuit held, no implications for a legal determination of actual malice. Any broadcast containing the disputed information "would have been no less defamatory than the October 6, 1980 broadcast itself." (A 46) The message would remain that Newton was applying for a license to own and operate a casino while indebted to organized crime figures and while seeking to deceive Nevada gaming authorities about his relationship with those crime figures.

including questions of credibility and of the weight to be accorded particular evidence." *Masson*, 111 S. Ct. at 2435.

The standards enunciated in *Bose* and *Harte-Hanks*, on the other hand, serve a completely different function. They are designed to enable an appellate court to fulfill its First Amendment responsibility independently to review the entire record in decisions where expression has been penalized. This is not an issue of denying a libel plaintiff his day in court, but rather of assessing the constitutional significance of the evidence produced in court. *Harte-Hanks*, 491 U.S. at 686. Appellate courts cannot conduct that assessment using the standards of deference appropriate to the evaluation of a motion for summary judgment, for such standards are inconsistent with the "rule of independent review" that "assigns to judges a constitutional responsibility that cannot be delegated to the trier of fact." *Bose*, 466 U.S. at 501.

Thus this Court has never intimated, and certainly did not intimate in *Masson*, that the ordinary standards of summary judgment in any way conflict with the established rule of independent review. The petition's contention to the contrary is without merit.

Equally so is Newton's contention that this case raises the question of whether a reviewing court may evaluate the proof of actual malice "upon its own statement-by-statement interpretation of the subject television broadcast" when that "interpretation conflicts with the overall meaning derived by the average member of the intended audience." (Pet. at i) Newton himself argued (and the jury concluded, A 85-86) that specific factual assertions in the broadcast were false and made with actual malice. That being so, the Court of Appeals had no alternative but to consider each statement potentially at issue.

The Court of Appeals, in any event, dealt elsewhere in its opinion with Newton's argument that NBC sought to leave a false "impression" about him by the entirety of its broadcast. (A 40-45) Newton himself had acknowledged (and urged the district court to charge the jury, as it did) that NBC

could not be held liable for leaving any false impression unless it had intended to do so. (A 126) The Court of Appeals reviewed the evidence on this issue, found no evidence supporting the notion that NBC had any such intent and rejected the erroneous view of the district court that such intent could be automatically and mechanically inferred from particular implications the district court believed it could find in the broadcast. (A 45) On the basis of its application of the very legal standard urged by Newton, then, the Court of Appeals correctly determined that any such finding of intent was insupportable.

CONCLUSION

In the end, Newton has set forth no issues (a) in conflict in the circuits; (b) as to which the Court of Appeals deviated from any ruling of this Court; or, in fact, (c) genuinely raised by this case. Newton is thus reduced to rearguing a series of disconnected factual assertions which—their frequent falsehood aside—do not provide this Court with a case worthy of its consideration.

The petition for a writ of certiorari should be denied.

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Respectfully submitted,

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